

COPYRIGHT ROYALTY BOARD

THE LIBRARY OF CONGRESS

---

IN THE MATTER OF: :  
: :  
DISTRIBUTION OF 2000, : No. 2008-02  
2002, 2003 CABLE :  
ROYALTY FUNDS : CD 2000-03  
: Phase II

---

Monday,  
June 3, 2013

Fourth Floor Hearing Room  
Madison Building  
Library of Congress  
101 Independence Avenue, SE  
Washington, DC

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE: THE HONORABLE SUZANNE M. BARNETT,  
Chief Judge

THE HONORABLE JESSE FEDER

THE HONORABLE DAVID STRICKLER

## APPEARANCES:

On Behalf of the Settling Devotional  
Claimants:

CLIFFORD M. HARRINGTON, ESQ.  
MATTHEW J. MacLEAN, ESQ.  
of: Pillsbury Winthrop Shaw  
Pittman, LLP  
2300 N Street, Northwest  
Washington, DC 20037-1122

(202) 663-8525

ARNOLD LUTZKER, ESQ.  
of: Lutzker and Lutzker, LLP  
1233 20th Street, Northwest  
Washington, DC 20036  
(202) 408-7600

On Behalf of the Independent Producers  
Group:

BRIAN D. BOYDSTON, ESQ.  
of: Pick & Boydston, LLP  
10786 LeConte Avenue  
Los Angeles, CA 90024  
(213) 624-1896

On Behalf of the Motion Picture  
Association of America:

GREGORY O. OLANIRAN, ESQ.  
LUCY HOLMES FLOVICK, ESQ.  
KIMBERLY NGUYEN, ESQ.  
of: Mitchell Silberberg & Knupp,  
LLP  
1818 N Street, Northwest  
Eighth Floor  
Washington, DC 20036  
(202) 355-7917

## ALSO PRESENT:

PAUL GALAZ  
VICTORIA LYNCH  
DENISE VERNON

## CONTENTS

WITNESS DIRECT CROSS REDIRECT RECROSS

Marsha Kessler 101 206

By Mr. Boydston 135 211

Jonda Martin 219

By Mr. Boydston 231

By Mr. Harrington 235

Kelvin Patterson 237 270

By Mr. Boydston 253

Paul Lindstrom 280

EXHIBIT NO. DESCRIPTION MARK RECD

MPAA

358 Direct Testimony of

Marsha Kessler 105 106

359 Rebuttal Testimony of

Marsha Kessler 127 129

360 Direct Testimony of

Jonda Martin 222 223

361 Rebuttal Testimony of

Jonda Martin 224 255

362 Direct Testimony of

Kelvin R. Patterson 248

363 Direct Testimony of

Paul D. Lindstrom 293

IPG

500 Representation Agreement 137 141

501 Certifications 145 204

502 Farm Journal 195 204

503 Network Programming 266 rej

Page 5

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:32 a.m.)

3 CHIEF JUDGE BARNETT: There has  
4 been one change since we were all here before.  
5 It used to be that the microphones on counsel  
6 table were not live unless you pressed.  
7 They're the opposite now. They're always  
8 live. So, if you're going to confer with one  
9 another be sure to mute the microphone.

10 Okay, good morning, all. This is  
11 the date and time set for hearing in Phase II  
12 of the distribution proceedings commenced  
13 under Copyright Royalty Board Docket Number  
14 2008-2 in re the distribution of cable royalty  
15 funds for the years 2000 through 2003.

16 I think I have met you all. I'm  
17 Judge Suzanne Barnett, the proverbial last man  
18 standing since we last met. Judge Strasser  
19 very happily reclaimed his position as senior  
20 counsel to the Copyright Royalty Board. Judge  
21 Roberts accepted a position as Senior Counsel  
22 to the Register of Copyrights.

1 other programs.

2           You'll be hearing testimony from  
3 SDC witness Dr. William Brown, a professor and  
4 research fellow at the School of  
5 Communications and the Arts at Regent  
6 University, a former dean of that school.  
7 He's also a partner in Brown, Frasier and  
8 Associates, a consulting firm. And he's  
9 previously been qualified as an expert in the  
10 Phase 1 2004 to 2005 cable distribution  
11 proceeding.

12           You'll also hear briefly in our  
13 case from Allen Whit, the data analyst, who  
14 generated the reports of viewing data for  
15 devotional programs, programming based on  
16 Nielsen and Tribune data that Dr. Brown relied  
17 on in allocated proportional shares.

18           You've heard the opening statement  
19 of IPG and you'll hear evidence from them.  
20 IPG is a private, for profit business, which  
21 has purportedly authority to collect royalties  
22 for certain producers of religious programs

1 and in return for that, they receive between  
2 15 and 40 percent of the funds that are  
3 distributed to IPG and its clients.

4           The contrast between the cases of  
5 IPG and SDC are pronounced. IPG relies on a  
6 formula developed by Raul Galaz, the founder  
7 of IPG, a man with no advanced training in  
8 statistics or economics, and who is  
9 admittedly, we've heard this morning, not an  
10 expert in the field. Nor does he have  
11 experience in producing, distributing, or  
12 placing religious programming on television  
13 stations or in the cable television industry.

14           The distribution formula advocated  
15 by IPG apparently achieves different results  
16 at the whim of its creator. SDC has received  
17 three different sets of tabulations over the  
18 past year, the last of which we received at  
19 4 p.m. Friday afternoon, three days ago.

20           Although each variation purports  
21 to correct highly material errors and  
22 formulation and calculation, the latest

1 version is still rife with errors and we'll  
2 prove that in our evidence. Significant  
3 programs claimed by SDC appear to have been  
4 omitted from SDC's data while programming  
5 based on IPG claims that the Judges have  
6 already dismissed from this proceeding are  
7 included. The formula relies primarily on the  
8 gross number of minutes of program air, a  
9 factor long rejected by every body charged  
10 with allocating royalties, the CRT, the CARP,  
11 and this body.

12           It also employs a methodology  
13 often criticized and recently rejected by the  
14 Judges in the 2004-2005 Phase 1 proceeding  
15 called fee generation. It's the effort to  
16 match programs transmitted to fees paid by  
17 cable operators.

18           Now the Judges have previously  
19 acknowledged there's no reasonably effective  
20 way that ties feed to tie -- fees paid in, to  
21 programs carried. In IPG's case, it's a  
22 particularly awkward and misguided attempt to

1 capitalize on the royalties paid that often  
2 bear no marketplace relationship to its  
3 putatively represented content. And that is  
4 the role of this Court or this Board to find  
5 marketplace value.

6           In contrast, we will provide you a  
7 study of program viewing, long the primary  
8 standard for Phase 1 case. In recent  
9 decisions, primacy of ratings have given away  
10 to the Bort study based on a survey of cable  
11 operators. Unfortunately, as noted by the  
12 CARP in the '98-'99 case, when the Bort survey  
13 cannot be used, you have to find an  
14 alternative approach and the Bort approach  
15 really does not work for individual programs.  
16 It works for program categories, but not  
17 individual programs because there's no real  
18 way to ask a group of cable operators about  
19 thousands and thousands of potential program  
20 titles.

21           In those cases, the CARP noted a  
22 study of ratings results can be very helpful



1 to determine the value of competitive claims.  
 2 Here, we will present the results of distant  
 3 cable household viewing and Nielsen's rating  
 4 data assessed by an expert in the field.  
 5 Unlike IPG's witness, SDC's expert has no  
 6 personal or family interest in the results of  
 7 this proceeding and can offer his professional  
 8 and scholarly views on the data he has  
 9 assessed.

10 In sum, as Judges, you're faced  
 11 with the alternative of a flawed, amateurish  
 12 methodology, whose author and close family  
 13 members have a personal and direct financial  
 14 interest in its adoption versus a fair and  
 15 balanced approach that relies on viewing data  
 16 and ratings that is an industry standard. We  
 17 respectfully urge the Judges to listen  
 18 carefully to the testimony, given careful  
 19 attention to the evidence. We're confident  
 20 that you will reject IPG's approach and adopt  
 21 the approach advocated by SDC. Thank you.

22 CHIEF JUDGE BARNETT: Thank you,

1 Mr. Harrington. We have 23 minutes until we  
 2 break for lunch. Do we have any witnesses  
 3 here and available this morning?

4 MS. PLOVNICK: Yes, Your Honor.  
 5 We have Ms. Kessler here and we probably have  
 6 about 30 minutes for her. I don't know if you  
 7 want to take that now or wait until after  
 8 lunch.

9 CHIEF JUDGE BARNETT: Let's take  
 10 it now and we'll adjust our noon break  
 11 accordingly.

12 MR. HARRINGTON: Your Honor, while  
 13 the witness is approaching, I just wanted to  
 14 clarify that as I recall from your order, it  
 15 was appropriate for counsel who did not use  
 16 their allocated time to reserve some time for  
 17 witness cross examination and we would like to  
 18 do that.

19 CHIEF JUDGE BARNETT: Okay, thank  
 20 you. Presumably, you all would. You've all  
 21 left time on the table and you may add it to  
 22 your total.

1 Also, just because we seem to have  
 2 no control over the temperature in this room,  
 3 please feel free if it becomes oppressive to  
 4 take your jackets off. It's -- we won't take  
 5 offense. We'll understand. We're wearing  
 6 plastic bags, so we know how it is.

7 (Laughter.)

8 Ms. Plovnick.

9 WHEREUPON,

10 MARSHA KESSLER  
 11 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE  
 12 MOTION PICTURE ASSOCIATION OF AMERICA AND,  
 13 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND  
 14 TESTIFIED AS FOLLOWS:

15 MS. PLOVNICK: And Your Honor, one  
 16 small housekeeping matter before I begin,  
 17 because the parties utilized certain exhibit  
 18 numbers in the preliminary hearing, we were  
 19 going to go with the next MPAA exhibit number  
 20 which for us would be 358, if that's  
 21 permissible?

22 CHIEF JUDGE BARNETT: I think

1 that's a capital idea. Thank you.

2 MS. PLOVNICK: So we will do that.  
 3 Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MS. PLOVNICK:

6 Q Will you please state your name  
 7 and spell it for the record?

8 A Marsha E. Kessler, Marsha, M-A-R-  
 9 S-H-A, Kessler, K-E-S-S-L-E-R.

10 Q Are you currently employed?

11 A No, I'm retired.

12 Q When did you retire?

13 A August 20, 2010.

14 Q And where did you work before you  
 15 retired?

16 A Motion Picture Association of  
 17 America.

18 Q What was your position at the  
 19 Motion Picture Association of America?

20 A I had the same position under  
 21 various titles. At the time I retired I was  
 22 the vice president of Retransmission Royalty

1 Distribution.

2 Q And how long were you in that

3 position?

4 A More than 28 years, less than 29.

5 Q What were your responsibilities in

6 that position?

7 A I had a broad category of

8 responsibilities. I helped our claimants file

9 their claims with the Copyright Office. I

10 assisted in the Nielsen viewing studies and I

11 worked with the various legal, accounting,

12 data technology professionals who provided

13 services related to the distribution of

14 royalties.

15 Q Where were you before MPAA?

16 A I was one of the founding members

17 of the Licensing Division here in the

18 Copyright Office.

19 Q How long were you at the Copyright

20 Office?

21 A I think it was about four years

22 from roughly 1978 or '79 to '82.

1 Q What were your responsibilities

2 there?

3 A Initially, there was a jukebox

4 compulsory license. I don't think it's

5 administered here, but at any rate I did a

6 little bit of jukebox work and then when I

7 came into being I examined statements of

8 account and later I was promoted to be a lead

9 examiner which meant I examined statements of

10 account. But I also advised colleagues when

11 they encountered difficulties or problems with

12 a particular statement of account.

13 Q Have you ever testified before

14 this body or any other body in connection with

15 the statutory licenses?

16 A With the exception of the '78 and

17 '79 proceedings, I've appeared in all Phase 1

18 proceedings and I believe all Phase 2

19 proceedings to the extent there were any.

20 Q Have you ever testified in any

21 royalty proceedings for other countries?

22 A Yes, I've appeared before the

1 Canadian Copyright Board and also before

2 Congress.

3 Q When you testified before those

4 bodies on whose behalf did you testify?

5 A In Phase 1 proceedings, I

6 testified on behalf of all program supplier

7 claimants. In Phase 2, I represented the

8 MPAA-represented program supplier claimants.

9 Q Ms. Kessler, what's your

10 educational background?

11 A I have bachelor's and master's

12 degrees in Spanish Language and Literature and

13 I have a non-credit degree as an ESL

14 instructor.

15 MS. PLOVNIK: May I approach the

16 witness?

17 CHIEF JUDGE BARNETT: You may.

18 BY MS. PLOVNIK:

19 Q I am now showing you, Ms. Kessler,

20 a document that's been premarked as MPAA

21 Exhibit 358. For the record, MPAA Exhibit 358

22 is entitled "Direct Testimony of Marsha E.

1 Kessler, dated May 30, 2012."

2 (Whereupon, the above-referred to

3 document was marked as MPAA

4 Exhibit 358 for identification.)

5 Have you seen this document

6 before, Ms. Kessler?

7 A Yes, I have.

8 Q What is MPAA Exhibit 358?

9 A It consists of my direct testimony

10 plus I believe they're called appendices A

11 through F.

12 Q Do you have any corrections to

13 MPAA Exhibit 358?

14 A I do not.

15 Q And do you declare today that MPAA

16 Exhibit 358 is true and correct and of your

17 personal knowledge?

18 A Yes, I do.

19 MS. PLOVNIK: Your Honor, I move

20 to admit MPAA Exhibit 358 at this time.

21 MR. BOYDSTON: No objection, Your

22 Honor.



1 MR. MacLEAN: No objection, Your  
2 Honor.  
3 CHIEF JUDGE BARNETT: Exhibit 358  
4 is admitted.  
5 (The document, having been marked  
6 previously for identification as  
7 MPAA Exhibit 358, was received in  
8 evidence.)  
9 BY MS. PLOVNIK:  
10 Q Ms. Kessler, what is the purpose  
11 of your testimony today?  
12 A I'll talk about three things  
13 today. First, I'll give a description of the  
14 nature of the programming that's covered under  
15 the MPAA program supplier claim. I'll also  
16 discuss the method by which MPAA had its  
17 claimants assert to their bona fides to  
18 collect royalties for individual programs.  
19 And lastly, I'll talk about my role in the  
20 special Nielsen studies.  
21 Q Ms. Kessler, did you testify in  
22 Phase 1 of this proceeding?

1 A Yes, I did.  
2 Q Is a copy of that testimony  
3 attached to MPAA Exhibit 358?  
4 A It is. It is shown as Appendix A.  
5 Q Thank you. Who does MPAA  
6 represent in this proceeding?  
7 A We have not only the major studies  
8 that Mr. Olaniran alluded to, but we have  
9 literally of dozens of -- well, large, medium,  
10 and small claimants with our group. They  
11 originate not only in the United States, but  
12 also some in Canada and parts of Europe.  
13 Q Did you provide a list of the MPAA  
14 represented claimants as a part of your  
15 testimony?  
16 A Yes, I did.  
17 Q And can you please identify where  
18 that appears?  
19 A It prepares as Appendix B to my  
20 testimony.  
21 Q Is that B as in boy?  
22 A B as in Boyston.

1 Q Is that list broken down by year?  
2 A Yes, it is.  
3 Q And why is that?  
4 A The same group of people may not  
5 claim from year to year. There may be name  
6 changes. There may be organizations who have  
7 claims in one year who don't have them in  
8 next. So in order to give an accurate  
9 reflection of the participants for each year,  
10 I broke it down by year.  
11 Q Approximately how many claimants  
12 does MPAA represent each royalty year?  
13 A Approximately 100.  
14 Q Does MPAA also indirectly  
15 represent any claimants?  
16 A We do. Many of these claims are  
17 what is called joint claims. A joint claim  
18 would be where an umbrella organization claims  
19 on behalf of multiple program owners. If you  
20 take those entities into account, we represent  
21 roughly 1400 claimants per year.  
22 Q Does MPAA have a representation

1 agreement with all of the entities listed on  
2 Appendix B?  
3 A Yes, we do.  
4 Q To your testimony. Do those  
5 agreements authorize MPAA to represent the  
6 interest of joint claimants on joint claims?  
7 A Yes, they do.  
8 Q So what sort of programs does MPAA  
9 represent in this proceeding?  
10 A If you look at pages four through  
11 six of my testimony, you'll see that the  
12 programs that fall under the MPAA umbrella are  
13 widely described as series and movies, but to  
14 limit it to that description really doesn't  
15 give us the basis for appreciating the actual  
16 kinds of programming that we have. Some of  
17 the programming is animated. Some of it is  
18 live action. An example would be Friends for  
19 a live action show. The Simpsons would be an  
20 example of an animated show.  
21 We have movies such as The African  
22 Queen or A Fish Called Wanda, one of my

1 favorites. We have game shows like Family  
2 Feud or Jeopardy. We have sports shows and  
3 sports-related programs. For example, Women  
4 of Wrestling is a show, or George Michael  
5 Sports Machine. We have pageants and awards  
6 shows such as the Fifth Annual Family Friendly  
7 Awards or the Golden Globe Awards. We have  
8 news shows such as the McLaughlin Group. We  
9 have health and fitness shows like the Wai  
10 Lana Yoga show that is referenced here. We  
11 have animal shows such as Animal Rescue. And  
12 then finally, we have talk and interview  
13 shows, for example, The Oprah Winfrey Show.

14 Q Is there a place in your testimony  
15 where you list all the different titles that  
16 MPAA represents in this proceeding?

17 A Yes, that's shown in Appendix C.

18 Q Is that list broken down by year?

19 A Yes, it is.

20 Q And why is that?

21 A Again, it's the same -- not every  
22 show was broadcast and distantly retransmitted

1 every year. So in order to be specific about  
2 which programs we're claiming for which years,  
3 I felt it was helpful to state it so.

4 Q So if you take all of those years  
5 together, approximately how many programs does  
6 MPAA represent in this proceeding?

7 A Roughly, 11,600.

8 Q Now during the years that you  
9 worked at MPAA, did MPAA maintain any internal  
10 standards for determining who could sign up to  
11 be a MPAA-represented claimant?

12 A Yes, we did. We called it the  
13 certification process.

14 Q And what were those standards?

15 A The standards, first of all, the  
16 claimant had to have filed a claim here at the  
17 Copyright Office. And evidence of that would  
18 be the appearance of the claimant on a list  
19 generated by the Copyright Office along with  
20 a claim number that's assigned.

21 Secondly, we required that the claimant  
22 provide us with a copy of what they had filed

1 at the Copyright Office. And third, we had  
2 them certify a list of works for which we were  
3 prepared to make remuneration.

4 Q Where those standards in place for  
5 the 2000 to 2003 cable royalty years?

6 A Yes, they were.

7 Q And was one of your requirements  
8 also that the claimant execute a  
9 representation agreement with MPAA?

10 A I'm sorry, that's one of the very  
11 important ones that I forgot. They absolutely  
12 had to -- there needed to be a mutually  
13 executed representation agreement between MPAA  
14 and the claimant.

15 Q Did MPAA require its claimants to  
16 certify each of the titles that they  
17 represented for the 2000 through 2003 royalty  
18 years?

19 A Yes.

20 Q What information was typically  
21 included in a certification for a title?

22 A The certification consisted of two

1 parts. One of them was a listing of all the  
2 works for which MPAA was prepared to make  
3 remuneration. And the second was a sheet on  
4 the top stating the name of the claimant, and  
5 they were the authorized claimant for each of  
6 the works listed on the printout except for  
7 some that they may have crossed out. If the  
8 claimant crossed out a work that indicated to  
9 us that they could not accept royalties for  
10 that and we would delete that from their list  
11 of works to be compensated.

12 Additionally, in the memo that  
13 would accompany the don't forget to certify  
14 your works project would be a -- if we've  
15 missed something, tell us now because this is  
16 your last opportunity to call our attention to  
17 anything we may have missed.

18 Q Would your claimant sign the  
19 certification?

20 A Yes.

21 Q Were all the titles listed in  
22 Appendix C to your written testimony subject



1 to certification?

2 A Yes, they were.

3 Q Now let's talk a little about the

4 Nielsen studies you mentioned previously. Did

5 you have a role in the development of MPAA's

6 Nielsen studies for 2000 through 2003?

7 A Yes, I did.

8 Q What was that role?

9 A I selected the stations whose

10 programming would be the basis for the

11 remuneration of royalties to the claimants.

12 Q How did you select those stations?

13 A The first part was to get a

14 listing of broadcast stations that were

15 retransmitted as distant signals from Cable

16 Data Corporation. That list typically

17 included stations not in the United States.

18 So I would -- and public television stations.

19 Q What sorts of cable systems were

20 covered by that data?

21 A Definitely Form 3s. I think for

22 some years, the Forms 1/2 data may have been

1 included. If I saw my files, I would

2 remember. I just don't remember off the top

3 of my head.

4 Q What systems did you rely on when

5 you were selecting stations for the Nielsen

6 study?

7 A Typically, the Form 3 stations

8 were certainly the starting point.

9 Q And why would you rely on Form 3s?

10 A I'm going to digress just a little

11 bit, but the purpose of the royalties here is

12 to remunerate program owners when their works

13 are retransmitted outside the local market to

14 which the work was originally licensed. So

15 when cable operators, Form 3 operators make

16 their payments, they have to specifically

17 identify which stations were retransmitted

18 outside the local market of the station. And

19 so that clearly provides the basis for

20 identifying distant retransmissions.

21 JUDGE STRICKLER: May I interject

22 with a question? Is that in contrast to Form

1 1 and Form 2 where you don't have that

2 identification of the retransmitted station?

3 THE WITNESS: That is correct,

4 sir.

5 JUDGE STRICKLER: Thank you.

6 BY MS. PLOVNIK:

7 Q Was there ever a time that you

8 decided to include a smaller system in your

9 analysis or use that as the basis for

10 selecting stations?

11 A I think that I certainly looked at

12 those data and again, if I had my sheets in

13 front of me, I could answer more directly, but

14 certainly looked at them. Whether they

15 actually became the basis, I don't recall.

16 Q Did you include Canadian, Mexican,

17 or public television stations?

18 A No, I did not.

19 Q Why not?

20 A MPAA has seen our responsibility

21 as remunerating for works only on U.S.

22 stations. And so for purposes of royalties,

1 we excluded those works, those stations.

2 Q Is there a list of stations

3 included anywhere in MPAA Exhibit 358?

4 A Yes, the stations are shown in

5 Appendix D.

6 Q Is that list specific to the year?

7 A Yes, again, it is. And the

8 reason, anticipating your question, is that

9 there's probably a core group of stations that

10 are distantly retransmitted from year to year.

11 But there are always outliers who may be there

12 for some years and not for others.

13 JUDGE STRICKLER: Counsel, excuse

14 me, again. I want to make sure we didn't skip

15 over something based on her written statement

16 that's now in evidence. Exhibit D is a list

17 of the sample stations that you selected out

18 of the universe of Form 3 stations, correct?

19 THE WITNESS: Yes, out of the

20 universe of distantly retransmitted stations.

21 JUDGE STRICKLER: Based on the

22 Form 3 data?



1 THE WITNESS: That was the  
2 starting point and just at this second don't  
3 recall whether I incorporated additional  
4 stations from 1/2s, but definitely the huge  
5 chunk of the sample came from the Form 3s.  
6 JUDGE STRICKLER: My question was  
7 addressed to the fact that Exhibit D is  
8 entitled "Nielsen Diary Study Sample  
9 Stations." What I'm trying to determine, so  
10 I understand what you're testifying to, is  
11 whether the sample is a subset of what you got  
12 from the Form 3 data because I don't know that  
13 you've necessarily said that yet. Maybe it's  
14 coming up on your testimony.  
15 THE WITNESS: What I'm saying is  
16 that I don't recall. What I'm saying is that  
17 definitely Form 3s are the basis for, if not  
18 100 percent of the stations, definitely the  
19 lion's share of the stations. I think in  
20 years after 2000, 2001, I increased the sample  
21 station, the number of stations in the sample  
22 and I just need to go back and look at my

1 pages to see what my basis was.  
2 I'm not trying to avoid your  
3 question. I'm comfortable in saying the vast  
4 majority are there due to their retransmission  
5 by Form 3 systems. There may be outliers in  
6 addition.  
7 BY MS. PLOVNICK:  
8 Q Ms. Kessler, when you say you  
9 looked at your pages, are you referring to the  
10 CDC data that you pulled from?  
11 A Yes, exactly.  
12 Q This is a large database file you  
13 received or a large Excel file, rather, that  
14 you received from Cable Data Corporation?  
15 A That's right.  
16 Q Listing cable system data?  
17 A Right.  
18 Q What all kind of data was included  
19 in that large file?  
20 A It would be the call sign of the  
21 station, its affiliation, the channel on which  
22 it broadcasts in its local market, the city to

1 which it was licensed, then multiple columns  
2 of data. One of the columns is definitely  
3 Form 3 subscribers. Another form, another  
4 column would be Form 3 fees generated.  
5 What I'm just not recalling at  
6 this moment, Your Honor, is whether I also  
7 worked with Form 1/2s, but if I actually saw  
8 my file I would know the answer to that.  
9 Q If you examined the large  
10 electronic file you would be able to determine  
11 exactly what was included?  
12 A Exactly.  
13 CHIEF JUDGE BARNETT: Ms. Kessler,  
14 you're not saying that Appendix D, let's take  
15 the Year 2000, for instance, includes all of  
16 the Form 3 stations that you got information  
17 on from CDC?  
18 THE WITNESS: That's correct, Your  
19 Honor.  
20 CHIEF JUDGE BARNETT: It's  
21 selected Form 3 stations.  
22 THE WITNESS: That's correct.

1 CHIEF JUDGE BARNETT: Okay.  
2 THE WITNESS: It was those carried  
3 by the highest -- those retransmitted to the  
4 highest number of distant subscribers.  
5 JUDGE FEDER: So that was the  
6 basis for the selection?  
7 THE WITNESS: Yes, sir.  
8 JUDGE STRICKLER: And just so  
9 we're clear, when the Judge asked about the  
10 selection, on page 11 of your direct  
11 testimony, you said -- this is about four  
12 lines from the bottom, "Using the CDC Form 3  
13 Statement of Account data, I identified and  
14 prepared a list of sample stations for each  
15 year."  
16 Do you see where I'm reading?  
17 THE WITNESS: I certainly do.  
18 JUDGE STRICKLER: You said sample  
19 stations. Can you tell the Court how you  
20 selected the sample?  
21 THE WITNESS: Certainly. It was  
22 based on the number of distant subscribers to

1 whom the programming was available. If you  
2 look at the next page of my testimony, page  
3 12, you'll see that the -- I listed the  
4 percentage of distant subscribers, but not the  
5 actual number. But the table in the middle of  
6 my testimony has four columns. And in the  
7 third column this shows the total number of  
8 distant subscribers covered by the sample.

9 JUDGE STRICKLER: But it wasn't a  
10 random sample, it was a sample that you  
11 started out with those systems that reached  
12 most subscribers and went down at some point,  
13 decided to cut off your sample list?

14 THE WITNESS: Exactly.

15 JUDGE STRICKLER: How did you  
16 decide when to stop?

17 THE WITNESS: Intuition. I would  
18 do an analysis similar or identical to that in  
19 the third column of the table on page 12. And  
20 at the sample size of 75 percent, I felt like  
21 that was a very good amount of coverage to  
22 measure distant viewing. In subsequent years,

1 I covered up to 85, 86 percent of distant  
2 subscribers. Again, these would be the  
3 subscribers who would have access to the  
4 programming.

5 JUDGE STRICKLER: Did you have any  
6 concern with where the place that you cut off  
7 the size of the cable system operated by way  
8 of subscriber, might impact the ratio of IPG  
9 shows that were distributed versus those that  
10 are represented by -- those claimants that are  
11 represented by MPAA?

12 THE WITNESS: IPG was not part of  
13 my consideration. What you have to consider  
14 are two things. Number one, the cost of  
15 additional data, and number two, any  
16 additional benefit to the data. In the case  
17 of getting additional data, most stations in  
18 the United States during this period and I  
19 believe now, are affiliated with a non-ABC, -  
20 CBS, or -NBC network. For example, there's  
21 some -- during this period I think there was  
22 UPN and WB Network, the Fox Network, Ion which

1 was formerly known as Pax and Univision.

2 So when you are purchasing  
3 additional data, essentially you're purchasing  
4 the same programs, more and more of the same  
5 programs. And in order to purchase enough  
6 stations to move the number of subscribers  
7 covered, you have to increase your sample  
8 size, but you don't get any benefit from it  
9 because you've already got the programs and  
10 everything will stay relative. Anything  
11 additional does not change the overall  
12 distribution of programs I think is what I'm  
13 trying to describe.

14 JUDGE STRICKLER: Is that the  
15 intuition you referred to before is knowing  
16 when to stop?

17 THE WITNESS: Yes.

18 JUDGE STRICKLER: And when you use  
19 that intuition as you just described it, you  
20 weren't thinking one way or the other as to  
21 how that might affect whether or not IPG  
22 programs that were represented would have

1 otherwise showed up in the data had you  
2 purchased more data?

3 THE WITNESS: IPG, I don't think  
4 it ever crossed my mind.

5 BY MS. PLOVNNICK:

6 Q Ms. Kessler, when did you acquire  
7 this data? It was well before this  
8 proceeding, correct?

9 A Absolutely, years and years  
10 before.

11 Q You retired from MPAA in 2010.

12 A Correct.

13 JUDGE STRICKLER: And you did the  
14 sampling all on your own. There was nobody  
15 else involved in it?

16 THE WITNESS: That's correct.

17 JUDGE STRICKLER: Thank you.

18 Sorry, counsel.

19 MS. PLOVNNICK: No, that's all

20 right.

21 BY MS. PLOVNNICK:

22 Q So after you selected these



1 stations, what did you do next?  
 2 A The Nielsen ratings do not  
 3 differentiate between distant and local  
 4 viewing. So I had to perform what is called  
 5 a distant county analysis which is a county by  
 6 county analysis for each sample station, the  
 7 end result of which identifies local counties  
 8 for each station.

9 I would then tell Nielsen these  
 10 are the local counties for station whatever  
 11 and Nielsen could exclude cable viewing to  
 12 those stations so that the end result was  
 13 distant cable viewing.

14 Q Do you explain the process for the  
 15 county analysis in Appendix F to your  
 16 testimony?

17 A F. Yes, I do.

18 Q Did you have any further  
 19 involvement with the 2000 through 2003 Nielsen  
 20 studies after the county analysis?

21 A No, that was the end of it.

22 Q Did you send the results to

1 Nielsen?

2 A Oh, yes. They definitely have to  
 3 go somewhere. I forwarded the data to Nielsen  
 4 so that they could perform their viewing  
 5 studies.

6 MS. PLOVNICK: Now may I approach  
 7 the witness?

8 CHIEF JUDGE BARNETT: You may.

9 BY MS. PLOVNICK:

10 Q I'm going to give you a copy of  
 11 MPAA Exhibit 359. 359 for the record is the  
 12 rebuttal testimony of Marsha E. Kessler, dated  
 13 May 15, 2013.

14 (Whereupon, the above-referred to  
 15 document was marked as MPAA  
 16 Exhibit 359 for identification.)

17 A Yes, I see that.

18 Q Have you seen MPAA Exhibit 359  
 19 before?

20 A Yes, I have.

21 Q And what is it?

22 A It is my rebuttal testimony,

1 including appendices A through E.

2 Q Do you have any corrections to  
 3 MPAA Exhibit 359?

4 A I don't know how to respond on  
 5 page five given the Judge's ruling this  
 6 morning. Initially, I would have struck Reel  
 7 Funds International because we had been  
 8 advised that they were withdrawing through  
 9 MPAA. I need a more learned person than  
 10 myself to help me out.

11 Q Subject to the Judge's ruling this  
 12 morning, other than the striking of Reel  
 13 Funds, do you have any other corrections?

14 A No, I don't.

15 Q And with this correction and  
 16 subject to the Judge's ruling this morning, do  
 17 you declare that MPAA Exhibit 359 is true and  
 18 correct and of your personal knowledge?

19 A I do.

20 MS. PLOVNICK: Your Honors, I move  
 21 to admit Exhibit 359.

22 MR. BOYDSTON: Excuse me, no

1 objection.

2 CHIEF JUDGE BARNETT: Exhibit 359  
 3 is admitted.

4 (The document, having been marked  
 5 previously for identification as  
 6 MPAA Exhibit 359, was received in  
 7 evidence.)

8 MS. PLOVNICK: Thank you, Your  
 9 Honor.

10 BY MS. PLOVNICK:

11 Q Ms. Kessler, what's the purpose of  
 12 MPAA Exhibit 359?

13 A My testimony has two objectives.  
 14 One is to talk about some work that I and my  
 15 former supervisor did with respect to  
 16 overlapping claims that both MPAA and IPG  
 17 claim to represent. And the other is to do a  
 18 review of the program categories, the Phase 1  
 19 program categories.

20 Q Let's talk about the program  
 21 categories that you mentioned. Is there a  
 22 place in MPAA Exhibit 359 where you discuss

1 the Phase 1 categories?

2 A Yes, that's on page 2 of my  
3 testimony.

4 Q Do you also discuss them in any  
5 addendums?

6 A Certainly. On Addendum A which is  
7 an advisory opinion regarding program  
8 categories, and Addendum B which is a  
9 description of the Phase 1 program categories.

10 Q Let's look at Addendum B which you  
11 just mentioned. How many Phase 1 categories  
12 are there?

13 A There are eight.

14 Q Can a single program fall in  
15 multiple Phase 1 categories?

16 A No, they are all uniquely --  
17 you're in one bucket or the other.

18 Q Why not?

19 A The Phase 1 -- these program  
20 definitions respond to the -- are  
21 representative of the eight groups who receive  
22 Phase 1 allocations. So I can't -- MPAA

1 cannot represent baseball and sports can't  
2 represent the Simpsons. They're mutually  
3 exclusive.

4 Q Mutually exclusive categories for  
5 programs?

6 A Correct.

7 Q All right, now let's go to the  
8 other portion which I think you had actually  
9 mentioned first which is the investigation you  
10 talked about. What was the first step that  
11 you had that investigation?

12 A I looked at IPG's direct case. I  
13 believe it was the Exhibit 1 and a number of  
14 claimants, represented claimants listed there  
15 rang bells with me because MPAA had, based on  
16 my recollection, had representation agreements  
17 with those claimants as well. So wanted to  
18 un muddy the waters as best we could. Is this  
19 claimant in the MPAA group or is the claimant  
20 in the IPG group?

21 Q So what did you do next after  
22 that?

1 A After that, my former supervisor,  
2 Jane Saunders, and I undertook to contact the  
3 -- what we call the overlapping claimants and  
4 to find out the circumstances, how is it  
5 possible that there are rep agreements between  
6 with your organization between MPAA and IPG  
7 and what's the correct way to go?

8 Q And after you contacted these  
9 claimants what, if anything, did they do in  
10 response to your inquiry?

11 A Virtually, all of them for almost  
12 all of the years considered themselves to be  
13 MPAA claimants. Some filed documents  
14 clarifying representation with the Judges and  
15 others provided evidence showing that they had  
16 terminated their association with IPG at an  
17 earlier date.

18 MPAA, as I understand it, had not  
19 received in discovery some of those  
20 termination letters. So we asked for copies  
21 of them.

22 Q Let's turn to Addendum D to your

1 testimony. And what is Addendum D?

2 A This is a letter to WSG from the  
3 U.S. Olympic Committee terminating IPG  
4 representation.

5 Q What's the date of that letter?

6 A It's dated January 22, 2003.

7 Q And who is it addressed to?

8 A Mr. Raul Galaz.

9 Q And to your knowledge was MPAA  
10 provided this letter in discovery?

11 A We are not copied on it and I  
12 don't personally recall seeing it in my  
13 capacity as an employee of MPAA. And I  
14 understand that it was not provided to counsel  
15 in discovery.

16 Q In the course of your  
17 investigation, did any other claimants who had  
18 previously notified the Judges that they  
19 terminated their relationship with IPG come to  
20 your attention?

21 A Yes. There is a local attorney  
22 named Ted Hammerman who represents a number of



1 claimants in these proceedings. And he called  
2 our attention to the document shown in  
3 Appendix -- I'm sorry, Addendum E which is a  
4 letter from the Farm Journal Media Company  
5 advising that WSG is not authorized to  
6 represent their claims.

7 Q And that's in Addendum E to MPAA  
8 Exhibit 3598?

9 A That's correct. E as in Edward.

10 Q All right. Thank you, Ms.  
11 Kessler. I have no further direct questions.

12 CHIEF JUDGE BARNETT: Thank you.  
13 We will take our midday break at this time.  
14 By my watch, it's 12:10. So we will reconvene  
15 at 1:10. Thank you.

16 (Whereupon, at 12:10 p.m., the  
17 hearing was adjourned, and will reconvene at  
18 1:16 p.m.)

19 CHIEF JUDGE BARNETT: Ms.  
20 Plovnick, did you complete your direct, then?  
21 MS. PLOVNIK: Yes, Your Honor. I  
22 was done with direct.

1 CHIEF JUDGE BARNETT: Okay.  
2 Cross-examination, Mr. Boydston?

3 MR. BOYDSTON: Thank you, Your  
4 Honor. Your Honor, similar to Ms. Plovnick,  
5 with regard to a housekeeping matter on  
6 exhibit numbers, IPG would like to begin  
7 additional exhibits with the number 500,  
8 because we didn't get to that in the previous  
9 one.

10 CHIEF JUDGE BARNETT: That will be  
11 just fine.

12 MR. BOYDSTON: There may have been  
13 a four hundred or two we didn't use, but I'm  
14 for sure we didn't use 500, so we'll be safe.

15 CHIEF JUDGE BARNETT: That's fine.  
16 Thank you.

17 MR. BOYDSTON: Thank you, Your  
18 Honor.

19 CROSS-EXAMINATION

20 BY MR. BOYDSTON:

21 Q Ms. Kessler, I am Brian Boydston.  
22 I represent Independent Producers Group. It

1 is correct that you were responsible for  
2 conducting MPAA's claims verification process  
3 as you described, correct?

4 A Yes, sir.

5 Q And is it accurate that MPAA  
6 directly represents approximately 100  
7 claimants, I think you said, correct?

8 A That's correct.

9 Q And are you familiar with the --  
10 you've said that there are contracts with  
11 those 100 claimants that the MPAA has,  
12 correct?

13 A Are you referring to the  
14 representation agreement?

15 Q Well, I'll just ask if they are  
16 contracts, and then it sounds like you have a  
17 name for them, so --

18 A We call them representation  
19 agreements.

20 Q Okay. And I realize "contract"  
21 may be a term of art, so I apologize. To use  
22 your term, the MPAA, to your understanding,

1 had an agreement, called a representation  
2 agreement, with those 100 claimants for these  
3 proceedings, correct?

4 A Correct.

5 Q Okay.

6 MR. BOYDSTON: Your Honor, I'd  
7 like to admit what I'd like to have marked --  
8 or, excuse me, I would like to present what we  
9 will mark as IPG 500.

10 (Whereupon, the above-referred to  
11 document was marked as IPG Exhibit  
12 No. 500 for identification.)

13 And I apologize, it's a little  
14 voluminous. If I may approach?

15 CHIEF JUDGE BARNETT: We've never  
16 had voluminous exhibits in this case before,  
17 Mr. Boydston, so I don't know how we'll handle  
18 it.

19 MR. BOYDSTON: Apologies.

20 CHIEF JUDGE BARNETT: Thank you.

21 MS. PLOVNIK: Your Honor, may I  
22 call your attention to the fact that these are

Page 138

1 restricted I think and subject to protective  
 2 orders or -- oh, I'm sorry. I have to press  
 3 the button here. These are --  
 4 CHIEF JUDGE BARNETT: No, it's on.  
 5 MS. PLOVNIK: He said ours is  
 6 not, so --  
 7 CHIEF JUDGE BARNETT: Oh.  
 8 MS. PLOVNIK: -- the Court  
 9 Reporter. I'm sorry.  
 10 So it may -- if we begin to read  
 11 language from these, it may be appropriate for  
 12 us to pre-review. But I would leave it to  
 13 your discretion.  
 14 CHIEF JUDGE BARNETT: Thank you,  
 15 Ms. Plovnick. These exhibits, or this  
 16 exhibit, has at least -- initially flipping  
 17 through, I can see that it consists of a great  
 18 many restricted pages and redacted pages.  
 19 Mr. Boydston, if you are going to  
 20 ask questions about any of the detail, then I  
 21 will depend on Ms. Plovnick let me know if we  
 22 are getting into an area where she feels it is

Page 139

1 restricted and we need to clear the courtroom.  
 2 MR. BOYDSTON: Understood, Your  
 3 Honor.  
 4 CHIEF JUDGE BARNETT: Okay?  
 5 BY MR. BOYDSTON:  
 6 Q Ms. Kessler, just take a look at  
 7 these briefly. We don't want you to look at  
 8 every page because we will be here way too  
 9 late, but are these the type of agreements  
 10 that you were referring to?  
 11 A Yes, they are.  
 12 Q Okay. They say "Representation  
 13 Agreement" on the top of it, correct?  
 14 A That's correct.  
 15 Q Okay. And did you assist in the  
 16 production of these documents in connection  
 17 with this litigation?  
 18 A I had retired by that time. I  
 19 directed the people who are still at MPAA  
 20 where to find them.  
 21 Q Okay. Did you have a hand in  
 22 directing the people at MPAA as to what

Page 140

1 portions to black out or redact in these  
 2 documents?  
 3 A They were redacted by counsel, and  
 4 I had no part in that.  
 5 Q Okay. And it's your recollection  
 6 that this is the way they were produced,  
 7 though, with the redactions, correct?  
 8 A Correct.  
 9 Q And do you know what the purpose  
 10 was of the redactions?  
 11 A I do not.  
 12 Q All right. Were you aware that  
 13 there was a protective order in this case that  
 14 would protect these documents from third  
 15 parties seeing them?  
 16 A Yes.  
 17 Q Do you know why it was that it was  
 18 determined that it was necessary to redact  
 19 them despite the existence of the protective  
 20 order?  
 21 A I do not.  
 22 Q Did anyone ever tell you?

Page 141

1 A No.  
 2 MR. BOYDSTON: Your Honor, I'd  
 3 like to move to admit Exhibit 500.  
 4 MS. PLOVNIK: Our only objection  
 5 would be that we would like it to be noted  
 6 that it is restricted and subject to the  
 7 protective order in this case. Other than  
 8 that, on the record, no objection.  
 9 CHIEF JUDGE BARNETT: Thank you.  
 10 Any objection from SDC?  
 11 MR. HARRINGTON: No.  
 12 CHIEF JUDGE BARNETT: Exhibit 500  
 13 is admitted as a restricted exhibit.  
 14 (Whereupon, the above-referred to  
 15 document, previously marked as 1PG  
 16 Exhibit No. 500 for  
 17 identification, was admitted into  
 18 evidence.)  
 19 MR. BOYDSTON: Thank you, Your  
 20 Honor.  
 21 BY MR. BOYDSTON:  
 22 Q Are you aware whether or not there



1 have been any other versions of these  
2 agreements that have been submitted in this  
3 action?

4 A I am not aware.

5 Q And so the only proof of these  
6 contracts that is before the parties and the  
7 Judges are these, as far as you know, correct?

8 A As far as I know, correct.

9 Q Okay. Let me ask you just to look  
10 at a page or two of these. As you can see,  
11 they are numbered in the bottom right-hand  
12 corner, starting with 5218. And let me ask  
13 you to page to what is marked as 05444, about  
14 in the middle of the stack. And, again,  
15 that's 05444. And it's a page that is just  
16 all black, correct?

17 A It sure is.

18 Q So it's a page that is -- has had  
19 all of the information on it removed, correct?

20 A Correct.

21 Q Do you know why it was necessary  
22 to remove every piece of information from some

1 of these pages?

2 A I do not.

3 Q Okay. And let me ask you to look  
4 at the last one, at one more that's similar,  
5 05511. And, again, that is 05511. And that  
6 is completely blank as well, correct?

7 A Wait. I have to catch up with  
8 you.

9 Q Sure. I apologize.

10 A 5511 is completely blank.

11 Q Okay. I could go through some  
12 others, but I think the point is made. Some  
13 of these pages were just completely wiped out,  
14 correct?

15 A The two that you pointed out are  
16 completely blanked out.

17 Q And I think that each of these has  
18 some redaction, correct? I don't think any  
19 were produced with no redactions. Is that  
20 your recollection?

21 A I did not participate in the  
22 redactions. So to the extent that they appear

1 in the format you have before me, you would  
2 have to discuss that with counsel.

3 Q Okay. Now, you testified that in  
4 addition to the 100 parties represented by  
5 these contracts that the MPAA independently --  
6 or, excuse me, indirectly represents a bunch  
7 of other entities as well, correct?

8 A That's correct.

9 Q And those other entities are  
10 represented by some of the contracting parties  
11 here, actually have separate contracts with  
12 other folks, correct?

13 A That's my understanding, yes.

14 Q Okay.

15 MR. BOYDSTON: Your Honor, I'd  
16 like to present what will be marked as IPG's  
17 Exhibit 501. I'm sorry. It's voluminous as  
18 well.

19 (Whereupon, the above-referred to  
20 document was marked as IPG Exhibit  
21 No. 501 for identification.)

22 BY MR. BOYDSTON:

1 Q And, Ms. Kessler, like the last  
2 exhibit, just take a glance at some of the  
3 pages here. Tell me if you generally  
4 recognize what these documents are, as a  
5 generality first.

6 A I recognize them.

7 Q And what are they? They are  
8 certifications, it says at the top, correct?

9 A These are the certifications it  
10 looks for -- like definitely calendar year  
11 2000 through 2003.

12 Q Okay. And it looks like, looking  
13 at the second page, there are some redactions  
14 there as well, correct?

15 A Yes.

16 Q And if I look at the fourth page,  
17 there are some redactions there as well,  
18 correct?

19 A Is that 1710?

20 Q Yes.

21 A Yes, there are.

22 Q And if you flip through this,

1 there are similar redactions throughout these  
2 documents, correct?

3 A Yes.

4 Q Now, back to the first page of  
5 Exhibit 501, looking down here where the  
6 signatures come in, I see it says that one of  
7 the signatories is Reny Montesinos, Manager,  
8 AFMA Collections, correct?

9 A Correct.

10 Q And AFMA Collections, was that one  
11 of the hundred entities that the MPAA had a  
12 contract with, I believe?

13 A Yes, it is.

14 Q And so no question that MPAA had a  
15 contract with AFMA. Now, this document refers  
16 to AFMA, and then on the -- well, on the  
17 second page, right underneath the heading it  
18 says, "Claimant Bennett Productions, Inc.,"  
19 correct?

20 A Correct.

21 Q So Bennett Productions, Inc., was  
22 that an entity that the MPAA contends it has

1 the right to collect royalties for?

2 A Yes, that's correct.

3 Q And at the same time, the MPAA  
4 doesn't have a contract with Bennett  
5 Productions. It has a contract with AFMA  
6 Collections, correct?

7 A Yes. If you'll refer to any of  
8 the representation agreements that you want to  
9 pick, if you'll look at paragraphs 16 and 17,  
10 paragraph 16 says that "If a claimant has  
11 submitted a joint claim for royalties, this  
12 agreement shall authorize MPAA to represent  
13 all joint claimants that are parties to the  
14 joint claim submitted by the claimant."

15 And then, 17, that "The claimant  
16 is the dually authorized representative of all  
17 joint claimants that are parties to the joint  
18 claim submitted by claimant, and is authorized  
19 by all such joint claimants to execute this  
20 agreement on their behalf, and to bind them to  
21 the provisions, terms, and conditions of this  
22 agreement."

1 Q Thank you. Now, with regard to  
2 these first two pages that we have been  
3 looking at on Exhibit 501, AFMA Collections  
4 does not own the programming content of  
5 Bennett Productions, correct?

6 A I have no information with respect  
7 to that question.

8 Q Okay. But your understanding is  
9 that MPAA's rights to make a collection for  
10 Bennett derive through its contractual  
11 agreement with AFMA.

12 A That's correct.

13 Q Not with Bennett.

14 A Correct.

15 Q Okay. Now, are you familiar with  
16 IPG and its claimants, to some degree?

17 A To some degree.

18 Q And is it your understanding that,  
19 somewhat like AFMA and Bennett, IPG has a  
20 contract with its claimants similar to the  
21 contract that AFMA has with Bennett?

22 A I have no knowledge of the

1 agreement between Bennett and AFMA -- I'm  
2 sorry, IFTA. IFTA became -- AFMA became IFTA.

3 Q Okay.

4 A And I have only seen redacted  
5 agreements between IPG claimants, so I don't  
6 have a basis to respond to your question.

7 Q Okay. When you put together the  
8 information to list all of the programs that  
9 the MPAA was making claim for -- I think it  
10 was the 11,600, correct?

11 A Correct.

12 Q Did you have any basis, then, to  
13 know that in fact, since you didn't know what  
14 the agreement was between AFMA and Bennett,  
15 how did you know that the MPAA should have the  
16 right to make a claim for Bennett, if you  
17 didn't know what the contractual relationship  
18 was between AFMA and Bennett?

19 A We have asked them to attest on  
20 their representation agreement that they have  
21 such authority.

22 Q Now, when you say you asked them



1 to attest, let's -- if we may be specific, you  
2 asked who to attest to what?

3 A By virtue of signing the  
4 representation agreement, AFMA has affirmed or  
5 confirmed -- I'm not sure if I'm using the  
6 correct word -- that they have the proper  
7 authority to assert the claim, and that they  
8 have the authority to bind their represented  
9 claimant to MPAA representation.

10 Q Okay. But you don't have -- you  
11 didn't get any information from Bennett to  
12 confirm from Bennett's standpoint that AFMA  
13 had the rights to make this claim, correct?

14 A Actually, in the case of Bennett,  
15 I don't have documents but a telephone  
16 conversation, because in one of the years  
17 Bennett filed an independent claim. And so I  
18 said, "You filed, and AFMA filed on your  
19 behalf," and my recollection is that he said,  
20 "Oh, if they file, that's fine. Go with  
21 AFMA."

22 Q Okay. Thank you.

1 A So in that particular case, I do  
2 know something.

3 Q You do have something.  
4 Understood. If we look at the third and  
5 fourth page of Exhibit 501, it looks like,  
6 again, it's an AFMA certification. And on the  
7 second page at the top it says "Claimant  
8 Carolco Pictures."

9 A Correct.

10 Q Do you know whether or not Carolco  
11 Pictures had in fact given its permission to  
12 AFMA to make claims on its behalf?

13 A I have no information.

14 Q And so there you are relying on  
15 the -- or, excuse me, on the representation  
16 agreement by AFMA saying, "We promise that we  
17 can represent everybody we are going to  
18 present to you," essentially, right?

19 A That's correct.

20 Q At any point in the process of  
21 verifying MPAA's claims, did you contact  
22 Carolco Pictures to make sure that was

1 actually the case?

2 A We did not.

3 Q And with regard to other entities  
4 represented by AFMA, did you, on a systematic  
5 basis, go through and confirm that all of  
6 these entities that AFMA claimed to represent  
7 in fact were represented by AFMA?

8 A We did not.

9 Q And is that the same for AGICOA,  
10 which is another contract -- company with a  
11 contract with the MPAA, correct?

12 A In no case did we contact the  
13 underlying claimants.

14 Q And I believe it is your testimony  
15 that the number of -- again, the number of  
16 claimants -- you have a direct contract where  
17 there is 100, but the indirect grows up to  
18 1,400, right?

19 A Was it that many? I thought it  
20 was like 11 -- 1,400, was that the number?

21 Q That's what I said, yes.

22 A Oh, okay. I'm sorry. Yes.

1 Q Is that correct?

2 A That's correct.

3 Q And so a lot of these claims of  
4 the 1,400 are situations where you don't have  
5 a direct contract like you do with the  
6 hundred. Instead, you are relying on the fact  
7 that the hundred say that they represent the  
8 1,400, correct?

9 A That's correct.

10 Q But there is no -- the MPAA  
11 doesn't go through any process to verify that  
12 on a case-by-case basis.

13 A That's correct.

14 Q Have you had circumstances in  
15 which it has turned out that one of the 100  
16 has claimed somebody and certified that they  
17 indeed, you know, have the right to represent  
18 another party, and then it turned out that was  
19 not the case?

20 A Not to my recollection, no, not  
21 during my time at MPAA.

22 Q Do you recall the entity that had

1 a contract with the MPAA called Fintage?

2 A Yes.

3 Q And do you recall, as you may have  
4 heard -- or, actually, strike that. Are you  
5 aware that Fintage claimed to have an  
6 agreement to pursue the rights on behalf of  
7 the BBC?

8 A It has only been brought to my  
9 attention during the course of these  
10 proceedings.

11 Q Okay. And are you aware that the  
12 BBC has disavowed Fintage's right in that  
13 regard?

14 A I think I heard you say that this  
15 morning.

16 Q Are you aware of any other MPAA  
17 parties with whom the MPAA has a direct  
18 contract, i.e., the 100, where a similar thing  
19 has come out, that somebody had claimed to  
20 have rights to never produce a contract to  
21 you, and then had to say, "Oh, you know,  
22 actually, we don't have those rights"?

1 A I don't recall. By saying I don't  
2 recall, I don't recall that that circumstance  
3 ever happened.

4 Q Okay. Do you know whether or not  
5 the MPAA ever asked parties like AFMA to  
6 produce its contract with its underlying  
7 parties, such as Carolco, et cetera?

8 A No, we never did.

9 Q Okay. So you never asked them to  
10 produce them, and you never contacted the  
11 represented parties, like Carolco,  
12 independently, correct?

13 A That's correct.

14 Q Are you aware of whether or not  
15 IPG requested to see the agreements between  
16 the MPAA and these 100 parties in this action?

17 A Am I aware that you asked to see  
18 the agreements?

19 Q Yes.

20 A Yes, I am.

21 Q And you're aware that they were  
22 produced in this fashion, correct?

1 A I see that now, yes.

2 Q Now, looking back at the  
3 Exhibit 500 --

4 A That's the rep agreements?

5 Q Yes. Thank you. My question --  
6 and you can just look at the first one or the  
7 second one, because it applies to all of them,  
8 is whether or not these, in this form, state  
9 what year they apply to.

10 A They do not.

11 Q Do you know why that is?

12 A There would have been a memorandum  
13 that I mailed in conjunction with this. And  
14 my recollection is the memorandum would state  
15 the beginning year. The reason was, up until  
16 a certain point -- and to tell you the truth,  
17 I don't recall which royalty year we changed  
18 it -- but we executed a representation  
19 agreement for every royalty year. So it was  
20 -- it became -- I hate to use the word  
21 "burdensome," but it was burdensome to do that  
22 process every year.

1 So at some point, and certainly  
2 that was I think the case starting in 2000, if  
3 not before, we became a -- we made it a  
4 perpetual representation agreement -- this may  
5 be the very first royalty year that was  
6 covered by that. I'm not going to testify  
7 that I know that for sure, but the memorandum  
8 that accompanied it would have said we are  
9 doing something new, it is going to be  
10 perpetual, it starts with royalty year  
11 whatever.

12 Q Okay. But in terms of trying to  
13 figure out what years these apply to, is it  
14 specified in these documents that it is  
15 perpetual?

16 A Yes, it is.

17 Q Okay.

18 A Paragraph 18, "This agreement  
19 exists in perpetuity."

20 Q Thank you. I appreciate that.  
21 Now, in the representation agreements, does it  
22 warranty in these representation agreements



1 that the individual party at issue has not  
2 already granted these rights to some other  
3 entity, like even IPG or the man on the  
4 street?

5 A I don't know what a warranty is.

6 Q Certainly. Is there anything in  
7 here that says, "I" -- in this case let's call  
8 it AFMA -- "I, AFMA, state that I have not  
9 given these rights that I am asking the MPAA  
10 to pursue to some other guy to pursue"?

11 A No. The representation agreement  
12 does not address that question.

13 Q Okay. And so if, in fact, that  
14 had happened, this agreement doesn't provide  
15 the MPAA with any ability to get recompense?

16 MS. PLOVNICK: Objection. Your  
17 Honor, Ms. Kessler is not an attorney, and she  
18 really shouldn't be asked to interpret the  
19 legal points of the contracts.

20 CHIEF JUDGE BARNETT: Sustained.  
21 But I think she already answered that she was  
22 not aware of any such provision in the

1 contracts.

2 MS. PLOVNICK: Thank you.

3 BY MR. BOYDSTON:

4 Q And when approximately did you  
5 retire? I only ask because I don't want to  
6 ask about questions that you weren't there  
7 for.

8 A I know exactly when I retired. It  
9 was on my 60th birthday, August 20, 2010.

10 Q Great. Do you recall, were these  
11 representation agreements used up until the  
12 time that you retired?

13 A I think they were not.

14 Q Do you know when they stopped  
15 being used?

16 A No, I do not.

17 Q Okay. Do you have an estimate?  
18 Were they only used during these years in  
19 question, or were they -- actually, strike  
20 that. Let me ask a good question. That's a  
21 bad one. We know they were used during these  
22 years. Were they used after these years, if

1 you know?

2 A I believe it changed. I don't  
3 recall what royalty year.

4 Q Fair enough.

5 A It was close to my retirement.  
6 Let's put it that way.

7 Q Okay. So sounds like it went on  
8 at least for a few years after this particular  
9 time period.

10 A That's correct.

11 Q Okay. Now, with regard to your  
12 testimony about the 11,600 titles, do you  
13 recall that?

14 A Yes.

15 Q And that is the number of titles  
16 -- it's an approximation, I presume, but  
17 that's the number of program titles the MPAA  
18 says it has a claim for in these proceedings,  
19 right?

20 A Listed by year. So that -- I  
21 don't want to try to -- I don't want to appear  
22 to be disingenuous about the number of works.

1 It depends on how you count. If you put all  
2 of them together, there are 11,000 works.  
3 However, the same work -- let's just pretend  
4 it's MASH -- might have been retransmitted  
5 every year.

6 So if you add all of the lists up  
7 together, you get MASH four times. But if you  
8 don't, you get it once per year. Just so you  
9 understand.

10 Q So if we only counted MASH once,  
11 and other programs like it -- in other words,  
12 not once for 2000, 2001, 2003, et cetera, but  
13 just once, period, the 11,600 figure would be  
14 much lower, correct?

15 A I don't know that it would be much  
16 lower, but it would be lower.

17 Q Because there are a number of  
18 programs where there was a claim each year,  
19 correct?

20 A Correct.

21 Q Okay. When you put this list of  
22 11,600 together, that is obviously a big list,

1 correct?

2 A Yeah.

3 Q Okay. And was it reduced to an

4 electronic format for ease of use?

5 A Yes.

6 Q Do you know why that electronic

7 format was never produced to IPG in discovery?

8 MS. PLOVNICK: Objection. The

9 Judge has already ruled that MPAA was only

10 required to produce a paper copy of its

11 exhibits in discovery if the -- the order I

12 believe mentioned it, in fact, and this seems

13 to be an attack on that order.

14 CHIEF JUDGE BARNETT: The

15 objection is sustained. Ms. Kessler was not

16 -- is not counsel and was not privy to the

17 decisions made by counsel, Mr. Boydston, so

18 that was not an appropriate question.

19 MR. BOYDSTON: Okay.

20 BY MR. BOYDSTON:

21 Q Now, in terms of compiling the

22 list, which that you do have, that was your

1 job, you did do that of course, right?

2 A Yes.

3 Q I understand the first step was to

4 analyze the program title information, is that

5 right?

6 A What process are we -- are we

7 still talking about the production of the

8 appendix?

9 Q No. I apologize. What I'm

10 talking about is your process of coming up

11 with the 11,600 titles.

12 A For the exhibit?

13 Q No. Let me back up. I'll start

14 all over, start from scratch.

15 A Okay.

16 Q My understanding is you used MPAA

17 -- you used data to come up with the list of

18 11,600 program titles, correct, to use --

19 A I did that only for the purpose of

20 this hearing.

21 Q Oh, okay. I thought that in

22 helping with the MPAA study you came up with

1 the program titles list, correct? No?

2 A For what purpose?

3 Q The purpose of assisting the MPAA

4 in putting together its study for this matter.

5 I apologize, it's --

6 A Ask me again. I'm sorry. I'm --

7 Q That's quite all right. That's

8 quite all right. As you know, the MPAA is

9 offering a certain methodology in these

10 proceedings, correct?

11 A I believe so.

12 Q And as I understand it, sort of

13 Step 1 in that process was the MPAA had to

14 figure out a comprehensive list of all of the

15 programs for which it would seek royalties in

16 this proceeding. And somebody had to figure

17 out --

18 A Oh, okay.

19 Q -- how do we know --

20 A So you are talking about the

21 appendix in my direct testimony of the works

22 that we --

1 Q Yes.

2 A -- are claiming. Okay.

3 Q Right. That list of 11,600

4 titles.

5 A Okay.

6 Q And you put that together,

7 correct?

8 A Yes.

9 Q And --

10 A Let me take that back. I did not

11 do that. I did not do that.

12 Q Do you know who did?

13 A I believe counsel put it together.

14 Q Okay. Did you provide information

15 to counsel so they could do it?

16 A Yes.

17 Q Okay. And what information --

18 A You know, I'm blanking on who did

19 it.

20 Q That's quite all right.

21 A Just give me --

22 Q Take a minute.



1 A -- a minute.  
 2 Q Sure.  
 3 A Just give me a minute and let me  
 4 figure out who did it, because it was I think  
 5 roughly a year ago. I honestly don't recall  
 6 whether it was counsel or I who did it.  
 7 Q Okay. Do you remember at some  
 8 point trying to cobble together information to  
 9 get that list together or to assist?  
 10 A Assist.  
 11 Q Okay. And how did --  
 12 A Can I confer with counsel?  
 13 Because I can get the answer quickly. I just  
 14 don't remember.  
 15 Q Well, let me withdraw that  
 16 question just for a minute, and let me ask you  
 17 this. Do you recall whether or not you looked  
 18 at certain information to either put the list  
 19 together or just assist? I'm really not so  
 20 concerned with whether you did it or you  
 21 assisted.  
 22 I'm just wondering, where did the

1 information come from to begin with? What was  
 2 the fount of knowledge, if you will? Is  
 3 there, you know -- was there a big stack of  
 4 papers you looked through or files or  
 5 something like that? Maybe the contracts  
 6 themselves?  
 7 A Wouldn't have been the  
 8 representation agreements. It may have been  
 9 the certifications of entitlement --  
 10 Q Okay.  
 11 A -- because those would list, with  
 12 the exception of anything lined out, those  
 13 would provide the works for which MPAA is  
 14 claiming remuneration.  
 15 Q Okay. There was a statement in  
 16 some of the MPAA papers that talked about  
 17 someone doing independent research on this  
 18 question to try and figure out if there were  
 19 additional titles that should be included in  
 20 the MPAA's list.  
 21 A Correct.  
 22 Q Do you recall doing that, or

1 anyone else doing that?  
 2 A I've done some of that actually,  
 3 yes.  
 4 Q Okay. And what was that  
 5 independent research?  
 6 A Sometimes we would have works that  
 7 we felt like there should be a claimant for,  
 8 but we were not aware that our client had  
 9 asserted a claim for it. And, unfortunately,  
 10 I don't remember the name of the company, but  
 11 it used to be called BIB, and MPAA had a  
 12 subscription to whatever the new company's  
 13 name is to see the producer and syndicator of  
 14 a work. And we would often go to that source  
 15 and see if the syndicator or the producer was  
 16 one of our claimants.  
 17 Also, and this was just -- I don't  
 18 know if it's fortuitous, but whatever -- I  
 19 speak Spanish, and there are a lot of English  
 20 language movies that are broadcast in Spanish,  
 21 either dubbed or subtitled. And so there was  
 22 a -- and, unfortunately, the foreign language

1 title may frequently have nothing to do with  
 2 the American language title.  
 3 So it's not a matter of  
 4 translation. It would be a matter of looking  
 5 at who the actors were, the production year,  
 6 et cetera. And so if I saw something that had  
 7 Paul Newman and whoever, and I knew the  
 8 American language, and I could sort of figure  
 9 out, I would match those together, see if  
 10 there was an MPAA claimant, and assign it to  
 11 that company to see if they could take credit  
 12 for it.  
 13 Q And what materials did you get  
 14 such information from? Like, for instance, in  
 15 your example, where would you see a Spanish  
 16 title and information about the actors that  
 17 you would then use to try and do the inquiry  
 18 you just described?  
 19 A Those would be works on the  
 20 retransmitted stations, from their program  
 21 logs.  
 22 Q So you'd get that information from

1 retransmitted stations program-wise.  
 2 A Correct.  
 3 Q And where does one get a  
 4 retransmitted -- I know the answer, but where  
 5 does --  
 6 A You want to see if I know the  
 7 answer.  
 8 Q Well, I know you do, too, but I  
 9 want to sure everybody else does. Where does  
 10 one get a retransmission log on -- that you  
 11 just described?  
 12 A A television station log?  
 13 Q Yes.  
 14 A I don't know how many sources  
 15 there are for that information. We purchased  
 16 ours from Tribune Media, which was previously  
 17 known as TV Data. I'm not sure which company  
 18 name was appropriate or --  
 19 Q Okay. So those --  
 20 A -- at that time.  
 21 Q It was materials like that that  
 22 you used to do this independent research.

1 A Correct.  
 2 Q Okay. Do you know whether or not  
 3 those documents were ever produced in  
 4 discovery in this matter to IPG?  
 5 A I do not know.  
 6 Q Okay. Now, once you did these  
 7 various things, the independent research,  
 8 et cetera, and you decided, gee, I think these  
 9 make the list of 11,600, I believe the next  
 10 thing was to send out the certification  
 11 notices, correct?  
 12 A Correct. But we didn't do it all  
 13 four years at one time. So to say I did it  
 14 four years in a row with that many titles  
 15 overstates what we did.  
 16 Q Okay. Why don't you just tell us  
 17 what you did.  
 18 A We compiled the list of works that  
 19 we believe were attributable to our claimants,  
 20 and we sent them the certification documents  
 21 as I have described before, the first one on  
 22 top of -- I'm sorry, I don't remember what

1 exhibit this was, but --  
 2 Q 501.  
 3 A 501 is the certification. So we  
 4 sent them a document that consisted of two  
 5 parts, the certification page and a page  
 6 listing the works that we believed were  
 7 attributable to their company. We told them  
 8 to cross out anything that didn't belong to  
 9 them, and also to bring our attention -- my  
 10 attention -- to anything they thought we had  
 11 missed.  
 12 Q Okay.  
 13 A So that we could doublecheck, see  
 14 if we had missed something, and make sure that  
 15 it was included.  
 16 Q And the first -- let's take the  
 17 first certification on 501, because it's easy  
 18 and at the top. The second page, that is the  
 19 program list that you referred to. This one  
 20 only has two, I believe, but I believe the  
 21 program list is Miss Hawaiian Tropic  
 22 International Pageant, and Miss Hawaiian

1 Tropic United States Pageant. Is that the  
 2 "program list" you refer to?  
 3 A Yes, it is.  
 4 Q So the idea is you send this to  
 5 these folks, and they see that and they say,  
 6 "Okay. I'll cross it off if it's not mine.  
 7 If it's not mine, I'll keep it the way it is  
 8 and send it back."  
 9 A That's the understanding, yes.  
 10 Q Okay.  
 11 A And sign the piece of paper --  
 12 Q Right.  
 13 A -- attesting to the bona fides to  
 14 claim the works.  
 15 Q Okay. Was there any concern that  
 16 by sort of suggesting to these people that  
 17 these were their programs you might just get  
 18 someone who doesn't cross them out, because  
 19 they just think "Hey, it's free money, it's a  
 20 free claim, I'll take it"?  
 21 A There is always a concern about  
 22 something like that. But we trust that there



1 are more honorable people and corporations  
2 than not.

3 Q Okay. Do you ever have situations  
4 or -- strike that. Still looking back at the  
5 same document, in the same two pages, it  
6 doesn't look -- what if they only owned it for  
7 part of the year? Does this take account for  
8 that or --

9 A It doesn't. But we did have a way  
10 of -- let me think. I know we had  
11 circumstances where one claimant might own a  
12 work for a portion of the time, and a second  
13 claimant would pick it up for the remainder of  
14 the year, something like that. And if they  
15 told us about that, we were able to allocate  
16 the royalties according to what information  
17 they called our attention to.

18 Q Okay. And what about a situation  
19 where maybe like the Miss Hawaiian Tropic  
20 owner only owned the rights in a certain  
21 region. Did you have a way of dealing with  
22 that?

1 A When I think of region, I think of  
2 worldwide royalties, but that's a term of art.  
3 I am not aware, in my experience, that more  
4 than one syndicator would have different --  
5 would be authorized to distribute in different  
6 markets. I'm not saying it's not so; it's  
7 just not in my experience.

8 Q And this document doesn't really  
9 do anything to make that determination as far  
10 as we can see.

11 A No, it doesn't.

12 Q Okay. So like here, it happens to  
13 be Hawaii. Let's say this person only owned  
14 the rights in Hawaii. You would go ahead and  
15 make the claim for rights across the United  
16 States.

17 A I don't think that --

18 Q I realize that is hypothetical,  
19 but --

20 A -- circumstance is not -- not  
21 likely to transpire.

22 Q I understand. If it were, that

1 would be the case, but it's unlikely, correct?

2 MS. PLOVNIK: Objection. This  
3 calls for speculation.

4 CHIEF JUDGE BARNETT: Sustained.

5 BY MR. BOYDSTON:

6 Q Now, as I understand it, the  
7 certification report is only asking about  
8 claims broadcast on U.S. stations, correct?

9 A Correct.

10 Q And is this one of the reasons why  
11 in your testimony you said you excluded  
12 Canadian and Mexican station broadcasts?

13 A And public television, yes.

14 Q Okay. And why did you think it  
15 was appropriate to exclude Mexican and  
16 Canadian broadcasts?

17 A I hate to say it's the way it has  
18 always been done. Essentially, that's it. We  
19 have -- MPAA has, throughout the years,  
20 asserted for -- we get a tiny bit of indirect  
21 allocation from Canadian stations, but it is  
22 not a direct payment or one that can be pinned

1 to specific works or even specific stations.

2 Q Okay.

3 A But we don't get an allocation for  
4 anything on Mexican stations and not for  
5 public television stations.

6 Q Do you understand that Canadian  
7 broadcasts of U.S.-owned material is  
8 compensable in this proceeding?

9 A I understand that there is a  
10 minute amount of programming that is  
11 compensable, yes.

12 Q And that minute amount is where it  
13 was broadcast by a Canadian station, picked up  
14 by a U.S. cable system operator, and the  
15 material itself was owned by an American, is  
16 that correct?

17 A I don't have that much  
18 information.

19 Q Okay. Is it fair to say you don't  
20 have enough information to say yes or no to  
21 that question?

22 A That's correct.

1 Q Okay. Now, the certifications are  
2 -- once again, these certifications, you only  
3 receive the certifications from agents like  
4 AFMA, not the parties they contract with,  
5 correct?

6 A That's correct.

7 Q Okay. And so you have AFMA  
8 saying, "Yes, we know that Bennett has these  
9 rights," but nothing from Bennett, although  
10 you said Bennett -- you actually had a phone  
11 call with them, so Carolco, I'll say. AFMA is  
12 saying, "We, AFMA, have a right for the  
13 programming of Bennett." But you have no  
14 certification with Bennett -- with Carolco  
15 saying, "We have the right," correct?

16 MS. PLOVNIK: Objection. This  
17 calls for speculation. Ms. Kessler testified  
18 about one claimant. He is asking for a  
19 generalization as to the whole group. She has  
20 already testified as to Bennett having a  
21 specific telephone conversation. I don't know  
22 that it is a generalized statement that can be

1 made to the whole group.

2 CHIEF JUDGE BARNETT: Overruled.

3 MR. BOYDSTON: And I think I asked  
4 the question twice, so I apologize to  
5 everybody.

6 BY MR. BOYDSTON:

7 Q I think in the case of Carolco  
8 there is no agreement with -- there is no  
9 certification from Carolco. The certification  
10 comes from AFMA, correct?

11 A That is correct.

12 Q And your understanding is that is  
13 the way it is done for all of the parties that  
14 the MPAA has contracts with where they  
15 represent other parties, too.

16 A Not just my understanding; it's a  
17 fact.

18 Q Yes. Okay. Thanks. Now, are you  
19 aware that there are programs within these  
20 certifications that are not being claimed by  
21 the MPAA in this proceeding?

22 A No, I'm not.

1 Q Okay. Do you -- well, strike  
2 that. Now, you don't have a background in  
3 statistics, I understand.

4 A I have coursework in statistics.

5 Q Okay. And how much coursework in  
6 statistics?

7 A Two courses.

8 Q And how long ago was that?

9 A A thousand years. Let me think.  
10 I'm going to guess the early '90s.

11 Q Okay. Do you consider yourself to  
12 be -- to have an ability to handle statistics?  
13 In other words, let me ask, I don't believe  
14 you hold yourself out as an expert in  
15 statistics, correct?

16 A Definitely not.

17 Q Okay. Do you feel like you have  
18 an ability to use statistics and handle  
19 statistics?

20 A Not comfortably.

21 Q Okay. Me neither. That's why I'm  
22 a lawyer.

1 A I was just going to say also, in  
2 the course of my ESL training, I had to take  
3 a testing course. So I have actually had  
4 three courses in statistics, and I didn't like  
5 any of them.

6 Q Okay.

7 A They were wretched.

8 Q Fair enough.

9 A With all due respect to the bench.

10 Q Now, you have been part of these  
11 proceedings for a long time, correct?

12 A Yes, I have been.

13 Q And I'm not going to ask your  
14 legal opinion, Scout's honor, but after they  
15 conclude they usually publish some kind of a  
16 ruling or a decision, right?

17 A That's correct.

18 Q And do you tend to read those  
19 after they come out?

20 A I think I've read most of them,  
21 yes.

22 Q Okay. Based on that, and not on a



1 legal conclusion, but just based on the fact  
2 that -- having read these, have you noted  
3 before that there have been times when the  
4 decisions have suggested that the MPAA maybe  
5 should have more stations in its surveys?

6 A I believe the '97 proceeding said  
7 that -- I'm just trying to remember if any  
8 after that stated that.

9 Q Okay.

10 A I know the '97 proceeding did.

11 Q Were you working at the MPAA when  
12 the 1983 proceedings went on? That's --

13 A Yes.

14 Q Okay. I didn't know if -- that  
15 was a ways back. Do you recall that in the  
16 1983 proceedings the MPAA used 117 stations in  
17 its survey?

18 A I don't recall.

19 Q Okay. Does that number sound  
20 about right or --

21 A Don't recall.

22 Q Okay. Fair enough. Do you recall

1 that back in '83 there were about 622  
2 retransmitted stations carrying MPAA material  
3 at the time?

4 A I have no recollection of that.

5 Q Okay. Now, during this time  
6 period, 2000 to 2003, do you have a general  
7 notion as to how many retransmitted stations  
8 carried MPAA material?

9 A I would think all of them did.

10 Q Okay. So probably something on  
11 the order of 900. Does that sound correct?

12 A I have no idea.

13 Q Okay. Now, I think for the first  
14 year here, 2000, you end up picking or coming  
15 up with a list of 81 stations, correct?

16 A Yes.

17 Q Okay. And how did you decide what  
18 a minimum amount of stations should be? Well,  
19 I think I -- it was asked in your direct, and  
20 you said you used your intuition. Is that  
21 correct?

22 A That's correct.

1 Q Okay. Is it your feeling that --  
2 I think the highest number of these four years  
3 was 2003 when you used a list of 125 stations,  
4 correct?

5 A Bear with me here.

6 Q Sure. Okay.

7 A Yes. It went from 81 stations in  
8 2000 to 125 in 2003.

9 Q And is it accurate that 125 in  
10 2003 started out as 128, but you had to -- you  
11 took off three stations because they had 100  
12 percent zero viewing, does that ring a bell?

13 A That does ring a bell.

14 Q Okay. And so what happened was  
15 you had 128, but when you looked at them there  
16 were three stations that just had a complete  
17 blank line, right?

18 A I didn't see the data myself. I  
19 believe that Nielsen advised me that there was  
20 no viewing -- distant cable viewing for those  
21 stations.

22 Q Okay. Based on having done this

1 for these different years, have you observed  
2 that if you have fewer stations you pick up  
3 fewer programs?

4 A No.

5 Q Are there some times when you have  
6 fewer stations but you pick up more programs?

7 A I don't know.

8 Q Okay. When you got together the  
9 Nielsen data in this proceeding, do you recall  
10 when approximately it was that you ordered  
11 this data for 2000 to 2003 from Nielsen?

12 A I can recall, I think, that it was  
13 certainly after the fact, meaning after the  
14 royalty years, by several years for each  
15 sample, for each study. But I don't recall  
16 specifically.

17 Q Okay. I seem to recall that you  
18 also told Nielsen you wanted them to segregate  
19 certain things, because you wanted certain  
20 counties only and not other counties. Why was  
21 that again?

22 A The Nielsen data -- Nielsen takes

1 measurements to TV stations on a county-by-  
2 county basis. But the distinction between  
3 distant and local is appropriate only for the  
4 people in this room and the claimants we  
5 represent. So there has to be a mechanism by  
6 which Nielsen knows where not to measure  
7 because it would be local viewing.

8 So the county analysis that I  
9 referred to identifies for each station the  
10 local counties, so that when Nielsen does its  
11 measurements the measurements that it gets  
12 filter out local viewing, so that only distant  
13 cable viewing is captured.

14 Q And I think that local viewing is  
15 -- there is a term of art, I believe.  
16 Sometimes people refer to the FCC footprint.  
17 Are you familiar with that?

18 A I am not.

19 Q Oh, okay. Is it fair to say that  
20 you don't know what the FCC footprint is?

21 A Not a clue.

22 Q Okay. Then I won't ask you about

1 it.

2 Who would you describe, if you  
3 could, as the architect of the MPAA viewer  
4 study? Who is the person most in charge of it  
5 as far as you would say?

6 A Well, you have asked two different  
7 questions.

8 Q Sorry.

9 A You didn't realize it. The  
10 architect is the late Alan Cooper. He was my  
11 supervisor when I came to MPAA in the '80s,  
12 and it was he who -- he certainly didn't do  
13 the programming, but he had the concept of  
14 doing it. And then the person who perpetuated  
15 it, meaning selecting the sample stations and  
16 commissioning the studies, was I.

17 Q That was who?

18 A Me.

19 Q Oh. It was you. Okay. Do you  
20 know when Mr. Gray was engaged for this  
21 proceeding?

22 A I do not.

1 Q Who directed you to order the  
2 Nielsen data?

3 A It was my job to do that.

4 Q Okay. And you just knew that you  
5 had to do that, no one had to say, "Ms.  
6 Kessler, order that Nielsen data"?

7 A No. It was part of my  
8 responsibility.

9 Q Okay. Are you able to explain the  
10 MPAA viewer study to the Judges?

11 A I don't know.

12 Q Well, do you want to give it a  
13 try?

14 A Yes. Let's see. Okay. I send  
15 Nielsen a list of the stations, and I tell  
16 them, "Don't measure viewing -- for Station 1,  
17 don't measure viewing in these counties  
18 because it is local. Only measure viewing  
19 outside these counties." So that's one  
20 instruction.

21 A second instruction is, "Put the  
22 programming in -- put each program in one of

1 eight categories representing the eight  
2 categories here before the Judges. Give us  
3 the answers." I think that's it.

4 Q Thank you. I believe that you  
5 asserted in your -- it may have been in your  
6 written testimony that viewing, as measured by  
7 Nielsen, is the predominant standard by which  
8 all television programming is commercially  
9 evaluated.

10 A That's correct.

11 Q And what is the basis -- or,  
12 excuse me, strike that. Have you ever been  
13 involved with the U.S. -- excuse me. Have you  
14 ever been involved with U.S. television  
15 syndication of a program?

16 A No.

17 Q Okay. Then, is your statement  
18 that viewership is the basis for commercial  
19 evaluation of television programming based on  
20 conjecture?

21 A Based on just experience and --  
22 not direct experience but knowledge of the



1 syndication industry.  
 2 Q Okay. Once again, going back to  
 3 some of the rulings that have been set down  
 4 over the years by the different panels that  
 5 have come and gone -- and, again, not asking  
 6 for a legal conclusion -- but do you just  
 7 remember from reading those that at times  
 8 there has been criticism of viewership-based  
 9 studies?  
 10 A I am aware of that.  
 11 Q Okay. Has there ever been any  
 12 discussion at the MPAA of looking for a  
 13 different approach, other than viewership-  
 14 based studies?  
 15 A For purposes of royalty  
 16 distribution, no.  
 17 Q Okay. Obviously, it has never  
 18 been done, but in addition to that, it has  
 19 never even been considered?  
 20 A Not during my tenure there.  
 21 Q Okay. You'll recall the last  
 22 Phase 2 proceeding was some time ago, and I

1 think you testified in it. That was for the  
 2 '97 royalty year, correct?  
 3 A Yes, that's correct.  
 4 Q And do you recall that the  
 5 decision that came out by the CARP made  
 6 comments about zero viewing -- the incidence  
 7 of zero viewing in the MPAA study. Do you  
 8 recall that?  
 9 A I recall that.  
 10 MR. HARRINGTON: Objection. Your  
 11 Honor, he's asking about a decision that was  
 12 vacated, so I don't think it's appropriate to  
 13 be questioning what the provisions of a  
 14 vacated decision are.  
 15 MR. BOYDSTON: If I may be heard  
 16 just on one thing. It was vacated. However,  
 17 it was by the Librarian, not the CARP. And  
 18 when the Librarian did it, it put in there in  
 19 text, "We vacate the decision, but not the  
 20 logic hereof." That's in the decision in  
 21 black and white.  
 22 CHIEF JUDGE BARNETT: Overruled.

1 BY MR. BOYDSTON:  
 2 Q In this proceeding, and in putting  
 3 together the MPAA study for this proceeding,  
 4 do you know whether or not the MPAA discussed  
 5 ways to reduce the incidence of zero viewing  
 6 in the study?  
 7 A We did not discuss it, and we did  
 8 not consider that it was a problem.  
 9 Q Okay. Now, you explained that one  
 10 of the things you worked on was what you  
 11 called an overlap between MPAA claimed  
 12 programs and IPG claimed programs --  
 13 A Correct.  
 14 Q -- correct? With regard to the  
 15 BBC, which we have discussed previously, they  
 16 were claimed as a program -- their programs  
 17 were claimed by Fintage, correct?  
 18 A I believe, yes.  
 19 Q Okay. And they are also claimed  
 20 by IPG, correct?  
 21 A Correct.  
 22 Q Did you ever ask Fintage to

1 validate its claims on behalf of the BBC? Or  
 2 do you know if anyone else did at the MPAA?  
 3 A I want to back up just a second,  
 4 and then I promise to respond to your  
 5 question.  
 6 Q No problem.  
 7 A Amongst syndicators, there are  
 8 many companies with different but similar  
 9 names. BBC is one of them. There is BBC  
 10 Worldwide, which is the entity that I believe  
 11 operates outside of the United States, and BBC  
 12 America.  
 13 So when you say BBC, like there  
 14 are three companies called Freemantle, but  
 15 they don't have anything to do with each  
 16 other. So I think it is important that we be  
 17 specific about which entity we're referring  
 18 to.  
 19 Q Let me withdraw the question on  
 20 BBC, then. Let me ask the same question with  
 21 regard to Reel Media. And to make the record  
 22 good, I'll start from scratch on the question.

1 Do you know whether or not the MPAA ever asked  
2 Fintage to validate that it was permitted to  
3 assert claims and try to collect claims on  
4 behalf of Reel Media?  
5 A We did not make that effort.  
6 Q Do you understand from these  
7 proceedings that in fact Fintage's claim on  
8 behalf of Reel Media has been disavowed by  
9 Reel Media?  
10 A Yes, I'm aware of that.  
11 Q Are you familiar with the entity  
12 -- I think you mentioned it -- strike that.  
13 Didn't you mention something about Farm  
14 Journal -- what's their name? Farm Journal  
15 Electronic Media, do you recall them?  
16 A Yes. It's my last appendix in my  
17 rebuttal testimony.  
18 Q Okay. And that was an entity, I  
19 think you said, where there was an overlap  
20 between IPG and MPAA, correct?  
21 A Correct.  
22 Q Okay. I'd like to present what

1 I'd like to mark as Exhibit 503. And this one  
2 is not voluminous, I'm happy to say. I'm  
3 sorry, 502. The first one was 500.  
4 I apologize, Your Honor.  
5 (Whereupon, the above-referred to  
6 document was marked as IPG Exhibit  
7 No. 502 for identification.)  
8 Let me ask you to take a look at  
9 that, and let me know if you have seen that  
10 before.  
11 MR. HARRINGTON: Do you have one  
12 for us?  
13 MR. BOYDSTON: Sure.  
14 THE WITNESS: Well, this catches  
15 me by surprise.  
16 BY MR. BOYDSTON:  
17 Q Okay. And why is that?  
18 A I have never seen it before.  
19 Q Okay. And would you agree that it  
20 is clear from this document that in fact  
21 although Farm Journal will have an overlap --  
22 there are overlapping claims for Farm Journal,

1 Farm Journal seems to be making pretty clear  
2 that it's IPG who has got them, right?  
3 A They certainly say, "Disregard the  
4 previous correspondence."  
5 Q Right. And I ask you this in part  
6 because you remembered Farm Journal in your  
7 direct independently, so I'm wondering if you  
8 might have a few other memories. Do you know  
9 whether or not the MPAA ever confirmed --  
10 MS. PLOVNIK: Objection. Ms.  
11 Kessler didn't remember it independently.  
12 That's a mischaracterization of her testimony.  
13 CHIEF JUDGE BARNETT: Sustained.  
14 BY MR. BOYDSTON:  
15 Q Okay. With regard to Farm  
16 Journal, do you recall whether or not the MPAA  
17 ever tried to validate with Farm Journal that  
18 in fact Farm Journal wanted its rights pursued  
19 by the MPAA or one of its agents?  
20 MS. PLOVNIK: Objection. Ms.  
21 Kessler never testified that MPAA represents  
22 Farm Journal. It is also not on the list of

1 claimants.  
2 MR. BOYDSTON: I thought I heard  
3 -- oh, sorry.  
4 CHIEF JUDGE BARNETT: Well, there  
5 was testimony that there was an overlap in  
6 claims.  
7 MS. PLOVNIK: No, Your Honor.  
8 There was testimony that they separately had  
9 notified the Judges that they terminated IPG,  
10 not that MPAA represented --  
11 CHIEF JUDGE BARNETT: That might  
12 be your memory of the facts, but that's not  
13 the testimony. The testimony -- the question  
14 was, were there overlapping claims, and Ms.  
15 Kessler said there were. And then Mr.  
16 Boydston began in with examples. And if this  
17 is not an example of overlapping claims, then  
18 we do need to clarify that for the record.  
19 MS. PLOVNIK: I'm sorry. I was  
20 referring to her direct testimony. So, but  
21 perhaps a clarification is -- and I can do  
22 that on redirect if you would like.



1 CHIEF JUDGE BARNETT: Or Mr.  
2 Boydston can clear it up, if he cares to. But  
3 I will leave it in your hands.

4 THE WITNESS: I'm confused.

5 BY MR. BOYDSTON:

6 Q Do you know whether or not the  
7 MPAA ever made a claim for the programming  
8 that is owned by Farm Journal?

9 A MPAA does not assert claims at the  
10 Copyright Office level. We don't file claims.  
11 And to my knowledge, this is the first time  
12 Farm Journal's programming has been subject to  
13 litigation before whatever body.

14 Q Okay. So I think it's probably,  
15 then, fair to say that you are not aware of  
16 the MPAA at any time ever trying to say --  
17 confirm with the folks at Farm Journal that  
18 the MPAA had a right to pursue their rights.  
19 It sounds like you don't think they --

20 A I can tell you that we became  
21 aware of their claims when they filed their  
22 own claims. And we I think had once talked

1 about the fact that, did they want MPAA  
2 representation? My recollection, though it  
3 may be faulty, is that they thought that they  
4 were represented by IPG, and I don't recall  
5 that a representation agreement was ever  
6 executed with them.

7 Q Okay. Let me ask you about Martha  
8 Stewart Living.

9 A Okay.

10 Q Do you recall that programming?

11 A Yes.

12 Q And do you recall that -- and I  
13 think it was affirmed by you, but that's why  
14 I'm asking, to make sure, that IPG affirmed  
15 its representation of Martha Stewart for the  
16 year 2000, does that sound familiar?

17 A Are you asking, were these  
18 overlapping claims?

19 Q No, not exactly.

20 A Help me out just a little bit.

21 Q Not exactly. Do you recall --  
22 were you ever shown -- I'll represent to you

1 that IPG produced to the MPAA a copy of an  
2 agreement with Martha Stewart Living. Did you  
3 ever see such a document?

4 A It's possible, but I don't recall  
5 specifically.

6 Q Okay. Are you aware as to whether  
7 or not the MPAA has ever produced or has a  
8 document with Martha Stewart Living, has an  
9 agreement with them? Sorry.

10 A Has an agreement? I would think  
11 there would be one in here.

12 Q Okay. And the one in here would  
13 be redacted like this one probably, right?

14 A Certainly.

15 Q Okay. And so do you know, or do  
16 you recall whether or not it was affirmed by  
17 IPG that IPG had a contract with Martha  
18 Stewart Living for the year 2000?

19 A I don't know what IPG did.

20 Q Okay. To your knowledge, Martha  
21 Stewart Living has never terminated -- sent a  
22 termination letter to IPG, has it?

1 A I don't know.

2 Q With regard to the United States  
3 Olympic Committee, do you know whether that  
4 entity has ever asserted that the claims made  
5 by IPG in these proceedings are claims that  
6 should have been made by the MPAA?

7 A Say that again.

8 Q Do you know whether or not the  
9 USOC has ever said that it should be the MPAA  
10 making claims on its behalf, not IPG making  
11 claims on its behalf?

12 A We have a representation agreement  
13 with them, and I believe there is a letter  
14 from them terminating their agreement with  
15 IPG.

16 Q And would that be included in  
17 Exhibit 500, the redacted representation  
18 agreements?

19 A No. The letter that I'm referring  
20 to?

21 Q I'm sorry. No, I wasn't referring  
22 to the letter. I was referring to -- and you

Page 202

1 brought up the letter, I understand that.  
2 What I'm asking you is, does the MPAA have a  
3 contract, like a certification or a  
4 representation agreement, with the USOC? I'm  
5 sorry.

6 A I believe there should be one  
7 there.

8 Q Okay. And redacted like the rest  
9 of them, I presume?

10 A Correct. I'm saying correct. I  
11 don't know what the redaction process was.  
12 But to the extent that they are all redacted,  
13 so what's true for one is true for all.

14 MR. BOYDSTON: Thank you. Nothing  
15 further.

16 CHIEF JUDGE BARNETT: This is  
17 probably a good time for us to take our  
18 afternoon recess, so we will do that. We will  
19 be at recess for 15 minutes.

20 (Whereupon, the proceedings in the  
21 foregoing matter went off the  
22 record at 2:15 p.m. and went back

Page 204

1 correct. And, actually, 500 was admitted as  
2 a restricted document. So 501 and 502 are  
3 admitted.

4 (Whereupon, the above-referred to  
5 documents, previously marked as  
6 IPG Exhibits Nos. 501 and 502 for  
7 identification, were admitted into  
8 evidence.)

9 MR. BOYDSTON: Thank you, Your  
10 Honor.

11 Now, Your Honor, I was instructed  
12 by my staff, who was instructed by Lakeshia  
13 Keys, to present these here today at this  
14 hearing.

15 CHIEF JUDGE BARNETT: Correct.  
16 Thank you.

17 MR. BOYDSTON: And then the last  
18 housekeeping matter, Your Honor, is this.  
19 With regard to exhibits that have been  
20 attached to the documents already filed with  
21 the Court, meaning the direct statements and  
22 the rebuttal statements, may we refer to those

Page 203

1 on the record at 2:39 p.m.)

2 CHIEF JUDGE BARNETT: Thank you  
3 for your patience. I'm afraid we ran over a  
4 bit.

5 Mr. Boydston, you are on your  
6 feet.

7 MR. BOYDSTON: Your Honor, may I  
8 approach briefly?

9 CHIEF JUDGE BARNETT: Yes.

10 MR. BOYDSTON: I have a couple of  
11 housekeeping things. But, first, I wasn't  
12 sure if I had done it, and I just wanted to  
13 ask -- I wanted to move to admit Exhibits 500,  
14 501, and 502 into evidence. I think I had  
15 them marked but not admitted.

16 CHIEF JUDGE BARNETT: Any  
17 objection, counsel?

18 MS. PLOVNICK: Only the previous  
19 qualification that 500 is subject to the  
20 protective order, and I believe that was  
21 already on the record.

22 CHIEF JUDGE BARNETT: That's

Page 205

1 exhibits as they are attached to those  
2 documents? Or do we need to have fresh copies  
3 all around?

4 CHIEF JUDGE BARNETT: They are  
5 attached to the testimony, the written direct  
6 testimony, the written rebuttal testimony.  
7 Let's just keep them -- we accepted Ms.  
8 Kessler's testimony with the appendices to it,  
9 and, you know, that is now in evidence. It  
10 was admitted as a whole, so --

11 MR. BOYDSTON: Like, for instance,  
12 if I refer to exhibits that are attached to  
13 the rebuttal testimony of Mr. Galaz that has  
14 been previously filed with the CRB, with the  
15 Panel, do I need to have a new copy of that?  
16 Or can I rely on the fact that the Judges have  
17 the copies we filed in the normal course?

18 CHIEF JUDGE BARNETT: We have the  
19 copies. Please don't provide us with more  
20 paper.

21 MR. BOYDSTON: That was my  
22 thought, but I --



1 CHIEF JUDGE BARNETT: Okay.

2 MR. BOYDSTON: -- saw that the

3 MPAA had new stuff, and I didn't know if I

4 should, too.

5 CHIEF JUDGE BARNETT: You don't

6 need to, as long as we are all clear and we

7 know what we are referring to.

8 MR. BOYDSTON: Great. Thank you.

9 CHIEF JUDGE BARNETT: Okay.

10 MS. PLOVNICK: Brief redirect,

11 Your Honor.

12 CHIEF JUDGE BARNETT: Yes. Well,

13 first, let me ask if there is any cross-

14 examination from the Settling Devotional

15 Claimants.

16 MR. HARRINGTON: No, Your Honor.

17 CHIEF JUDGE BARNETT: Okay. Now,

18 Ms. Plovnick.

19 MS. PLOVNICK: Thank you, Your

20 Honor.

21 REDIRECT EXAMINATION

22 BY MS. PLOVNICK:

1 Q Hello, Ms. Kessler. First, I

2 wanted to clarify, does MPAA file claims on

3 behalf of --

4 A We do not.

5 Q And did all of the entities on

6 Appendix B to MPAA Exhibit 358 file a claim

7 with the Copyright Office --

8 A Yes, they did.

9 Q -- for the particular royalty year

10 indicated?

11 A Yes, they did.

12 Q And as a part of filing that

13 claim, did they have to attest that they had

14 authority to file the claim on behalf of any

15 joint claimant they may have filed on behalf

16 of?

17 A I believe that language is in the

18 claim language.

19 Q And then, again, when they signed

20 a representation agreement with MPAA, there is

21 a provision which you talked about previously

22 regarding representation of entities on joint

1 claims.

2 A That's right.

3 Q That's correct? So is it your

4 understanding that the entities that signed

5 representation agreements with MPAA had

6 attested their authority to represent

7 underlying claimants on joint claims?

8 A Yes, it is.

9 Q All right. The MPAA

10 representation agreement is perpetual,

11 correct?

12 A Yes, it is.

13 Q And you talked a little bit about

14 the 1997 proceeding and the Phase 2 order in

15 that proceeding. Do you know when that order

16 came out, the date of it?

17 A I don't recall.

18 Q Was it December 26, 2001?

19 A If you assert to me that it was, I

20 will accept your word.

21 Q Do you know if that decision was

22 appealed?

1 A Yes, I do.

2 Q Do you know when the appeal was

3 resolved?

4 A I do not.

5 Q Would it be April 2004?

6 A It might be.

7 Q It might be. All right. Did any

8 action that MPAA may have taken in regard to

9 those rulings, would that have been after the

10 appeal was resolved, or after the decision

11 came out, or later?

12 A All are possible. I don't know.

13 Q But it would certainly have not

14 been prior to a decision --

15 A Correct.

16 Q -- correct?

17 A Absolutely.

18 Q All right. I wanted to clarify --

19 Farm Journal Electronic Media, is it your

20 understanding that MPAA is claiming to

21 represent Farm Journal Electronic Media?

22 A I believe we are not.

1 Q Thank you.

2 A And my apologies for suggesting

3 otherwise.

4 Q With regard to Reel Funds Media,

5 Mr. Boydston asked you questions about them.

6 Are you aware that Fintage filed a withdrawal

7 as to Reel Funds Media?

8 A I have been told that they did.

9 Q And do you know why they did?

10 A I have been told that IPG

11 threatened litigation against Reel Funds.

12 Q And Mr. Boydston also asked you

13 questions about Dr. Gray. Do you know what

14 Dr. Gray did with the diary study that you

15 ordered from Nielsen?

16 A I do not.

17 Q Have you read Dr. Gray's

18 testimony?

19 A I have not.

20 Q So you don't really know anything

21 about Dr. Gray's analysis.

22 A Completely ignorant.

1 MS. PLOVNICK: All right. Thank

2 you. I have no further questions for Ms.

3 Kessler.

4 CHIEF JUDGE BARNETT: Thank you.

5 Mr. Boydston?

6 MR. BOYDSTON: May I have a

7 recross, very briefly?

8 CHIEF JUDGE BARNETT: Very

9 briefly.

10 MR. BOYDSTON: Certainly, ma'am.

11 RECROSS-EXAMINATION

12 BY MR. BOYDSTON:

13 Q Ms. Kessler, with regard to Reel

14 Funds, you said that all of the entities in

15 your Exhibit B attested that they had the

16 authority to represent those people with whom

17 they had contracts, correct?

18 A Correct.

19 Q Wouldn't you agree with me that in

20 the case of Reel Funds that attestation was in

21 fact false, since they didn't have the

22 authority as it turned out?

1 A So it would seem.

2 Q Fintage didn't have the authority,

3 I mean. Now, if IPG had signed up with the

4 MPAA like Fintage, would IPG have had to have

5 shown the MPAA all of its contracts with all

6 of the entities it represents?

7 A No.

8 MR. BOYDSTON: Thank you.

9 CHIEF JUDGE BARNETT: Any

10 questions from the bench?

11 JUDGE STRICKLER: I have one or

12 two. Ms. Kessler, this goes back to something

13 I had addressed with you before. In your

14 direct testimony, in your written testimony,

15 you list in your chart the number of sample

16 stations on page 12.

17 THE WITNESS: Yes, sir.

18 JUDGE STRICKLER: It varies from

19 year to year, a range of 81 through 125. What

20 was the universe of the number of stations?

21 You sampled on those numbers. What was the

22 universe?

1 THE WITNESS: I don't recall. I

2 heard Mr. Boydston suggest that it may have

3 been in the range of 900 stations.

4 JUDGE STRICKLER: Well, separate

5 and apart from what counsel had said, do you

6 recall? Or does that refresh your

7 recollection?

8 THE WITNESS: I do not recall.

9 JUDGE STRICKLER: Does that

10 refresh your recollection of --

11 THE WITNESS: No, it doesn't.

12 JUDGE STRICKLER: You have no

13 knowledge of this.

14 THE WITNESS: I can find out. I

15 don't know here on the stand.

16 JUDGE STRICKLER: Okay. And with

17 regard to the year 2003, you said originally

18 you had sampled 128 stations, not 125, is that

19 right?

20 THE WITNESS: Correct.

21 JUDGE STRICKLER: And the reason

22 why you reduced it from 128 to 125 was because



1 you had heard from Nielsen --

2 THE WITNESS: Correct.

3 JUDGE STRICKLER: -- that three of

4 those stations showed no viewership

5 whatsoever?

6 THE WITNESS: Correct.

7 JUDGE STRICKLER: Who did you hear

8 from from Nielsen in that regard? Do you

9 know?

10 THE WITNESS: Our contact person

11 changed. I don't recall if it was Mr.

12 Lindstrom, who is going to be here, or

13 somebody named David, whose last name I don't

14 recall. But I know he is not there anymore.

15 But between the two of them, one

16 of them -- and to tell you the truth, I don't

17 even recall if they told us or if we looked

18 and we thought we were missing three stations,

19 and we went back and we said, "We ordered

20 these three stations, but there is no data."

21 And then they said, "Oh, that's because there

22 was no viewing."

1 I don't recall the specific

2 circumstances. I just recall that they did

3 not have any distant cable viewing.

4 JUDGE STRICKLER: Well, in light

5 of the fact that there was no distant -- or

6 despite the fact that there was no cable

7 distance viewing, why did you not just keep

8 the 128 in the number of stations? That's the

9 number that you had selected and it was your

10 selection being given to Nielsen, rather than

11 the other way around.

12 THE WITNESS: It was not a matter

13 of ditching the three stations. It just meant

14 for the purposes of royalty distribution,

15 there would not be a royalty for any claimants

16 who had works on those, because there had to

17 be viewing to the programs in order for the

18 claimant to accrue a royalty.

19 JUDGE STRICKLER: Was there any

20 discussion between you and Mr. Lindstrom, or

21 David, whose last name you don't recall, about

22 eliminating those three, a specific reason as

1 to why you should do that?

2 THE WITNESS: No. There was not

3 any discussion. It is like -- I am just

4 trying to think of an analogy. Zero is zero.

5 So there wasn't anything we could do with it.

6 It's like -- oh, golly. You have to have data

7 in order to generate. You can't generate

8 something out of nothing. You need data to

9 produce a result, and there were no data, no

10 viewing data. So there was no -- there was

11 nothing to work with. Nothing to work with.

12 JUDGE STRICKLER: You considered

13 the zero to mean nothing to work with?

14 THE WITNESS: Correct. It would

15 not result in a royalty to any claimant.

16 JUDGE STRICKLER: So ultimately

17 was it your decision to reduce the number of

18 stations in 2003 in the sample from 128 to

19 125, or was it Nielsen's, or was it a joint --

20 THE WITNESS: It was not a

21 decision. It was a default. There is nothing

22 there. It wasn't a -- they were stricken.

1 They were ordered. If they had had viewing,

2 we would have used them for the distribution

3 of royalties. But the -- there was no purse.

4 There was a purse, but there was

5 nothing in it. There was no basis. There was

6 no data, and so you can't generate something

7 out of nothing. I think I'm not answering

8 your question.

9 JUDGE STRICKLER: Well, if that --

10 you've answered it. If that's your answer,

11 that's fine.

12 THE WITNESS: That's my answer.

13 But if you have a concern, I would love to

14 address it.

15 MS. PLOVNIK: Your Honor, may I

16 ask a clarifying question?

17 CHIEF JUDGE BARNETT: You may.

18 MS. PLOVNIK: Ms. Kessler, when

19 you ordered the data, was it for this

20 proceeding, or was it for an internal

21 distribution of royalties that --

22 THE WITNESS: It was for the

1 internal distribution of royalties and  
2 potentially for a Phase 1 proceeding.  
3 MS. PLOVNICK: But you did not --  
4 you ordered it for your own internal purposes  
5 at MPAA when you made the order. That was  
6 your primary purpose.  
7 THE WITNESS: That's correct.  
8 JUDGE FEDER: And when was this?  
9 THE WITNESS: I don't recall, but  
10 it would have been between one and two years  
11 after the royalty year. So if we're talking  
12 about the 2000 sample, I most likely would not  
13 have ordered it until 2002 at the earliest.  
14 CHIEF JUDGE BARNETT: Any other  
15 questions? Any questions of counsel based on  
16 the questions from Judge Strickler or Judge  
17 Feder?  
18 (No response.)  
19 Okay. Thank you.  
20 Thank you, Ms. Kessler. You may  
21 step down.  
22 THE WITNESS: Thank you.

1 (Whereupon, the witness was  
2 excused.)  
3 CHIEF JUDGE BARNETT: Mr.  
4 Olaniran, you may call -- or, Ms. Plovnick,  
5 you may call your next witness.  
6 MS. PLOVNICK: MPAA calls Jonda  
7 Martin to the stand. We are going to pull her  
8 out of the witness room.  
9 WHEREUPON,  
10 JONDA MARTIN  
11 was called as a witness by Counsel for MPAA  
12 and, having been first duly sworn, assumed the  
13 witness stand, was examined and testified as  
14 follows:  
15 DIRECT EXAMINATION  
16 BY MS. PLOVNICK:  
17 Q Can you please state your name,  
18 and spell it, for the record?  
19 A Sure. Jonda Martin. J-O-N-D-A,  
20 Martin, M-A-R-T-I-N.  
21 Q Ms. Martin, what is your  
22 educational background?

1 A I have an undergrad B.S./B.A. in  
2 Business Administration from American  
3 University with a concentration in management  
4 information systems, and an M.B.A. from  
5 University of Maryland.  
6 Q And where do you work?  
7 A Cable Data Corporation.  
8 Q And is there an acronym by which  
9 Cable Data Corporation is often referred?  
10 A Yes. It's commonly referred to as  
11 CDC.  
12 Q So what does the CDC do?  
13 A We spend a lot of time collecting  
14 statements of account here at the Licensing  
15 Division, Copyright Office, researching,  
16 collecting, aggregating, reporting, analyzing  
17 the data as filed.  
18 Q And when did you start working for  
19 CDC?  
20 A Twenty-five years ago.  
21 Q And what were your duties and  
22 responsibilities at the time you started

1 working at CDC?  
2 A Initially, largely at a research  
3 and data entry analysis level.  
4 Q Did those responsibilities change  
5 over time?  
6 A They did.  
7 Q And what is your current position  
8 there?  
9 A I currently am owner and president  
10 of Cable Data.  
11 MS. PLOVNICK: All right. Now, so  
12 just for Your Honor, so you -- just so I'm  
13 clear, I have additional copies, but you would  
14 prefer that I don't give you an additional  
15 copy of Ms. Martin's testimony? Because I was  
16 going to mark it for the record and distribute  
17 and show the witness, but --  
18 CHIEF JUDGE BARNETT: I would  
19 prefer that you not, except for the fact that  
20 I left mine.  
21 MS. PLOVNICK: Oh, okay.  
22 CHIEF JUDGE BARNETT: So if I



## Certificate of Service

I hereby certify that on Thursday, April 05, 2018 I provided a true and correct copy of the Designated Prior Testimony of Marsha E. Kessler, Oral Testimony in Docket No. 2008-2 CRB CD 2000-2003 (Phase II), Transcript pp. 94-221 (June 3, 2013). to the following:

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at [brianb@ix.netcom.com](mailto:brianb@ix.netcom.com)

Devotional Claimants, represented by Benjamin S Sternberg served via Electronic Service at [ben@lutzker.com](mailto:ben@lutzker.com)

Signed: /s/ Lucy H Plovnick